

# REPORTS

ON

## THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES.

SUBMITTED TO

HON. ELIHU ROOT,  
SECRETARY OF WAR,

BY

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WAR DEPARTMENT.

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WAR DEPARTMENT,  
*Washington, October 30, 1901.*

DEAR SIR: Your reports upon the various questions of law arising during the military occupation of the islands ceded or yielded by Spain under the treaty of Paris, have been of such value to me in deciding the questions treated that I have determined to have them printed for the use of the officers concerned in the government of the islands. Will you please to prepare them for publication as soon as may be convenient?

Very truly yours,

ELIHU ROOT,  
*Secretary of War.*

HON. CHARLES E. MAGOON,  
*Law Officer, Division of Insular Affairs,  
War Department, Washington, D. C.*

## N O T E .

In order to prevent misunderstanding, attention is directed to the fact that the reports of the law officer of the Division of Insular Affairs are not judicial decisions. The authority to declare the determination of the War Department as to the questions discussed in said reports is retained and exercised by the Secretary of War. These reports were prepared for his use and information in arriving at such determination and are now published by his direction. The writer sincerely hopes the publication may be of service to the constantly increasing number of persons whose interest is awakened or whose rights are involved in the propositions discussed.

CHARLES E. MAGOON,  
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*War Department, Washington, D. C.*

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# REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES.

[Case No. 1102, Division of Insular Affairs. Submitted October 19, 1899.]

## THE POWERS, FUNCTIONS, AND DUTIES OF THE MILITARY GOVERNMENTS MAINTAINED BY THE UNITED STATES IN THE ISLANDS LATELY CEDED AND RELINQUISHED BY THE GOVERN- MENT OF SPAIN.<sup>a</sup>

### I.

Military governments, resulting from military occupation, are intended to perform two services: (1) Promote the military operations of the occupying army; (2) preserve the safety of society. (Ex parte Milligan, 4 Wall., 127.)

The governments now being maintained by the United States in said islands were instituted during a war, by the exercise of an undoubted belligerent right in discharge of a national obligation imposed by international law, namely, an invader having overthrown the existing government must provide another one. The Brussels Project of an International Declaration concerning the Laws and Customs of War, recites:

ART. 2. The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure, as far as possible, public safety and social order.

(See also sec. 43, Recommendations of Institute of International Law, Oxford Session, 1880.)

Lieber's Instructions for the Government of Armies of the United States in the Field (G. O. 100, A. G. O., 1863) provides as follows:

1. A place, district or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army. \* \* \* Martial law is the immediate and direct effect and consequence of occupation or conquest. \* \* \*

2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander in chief, or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same. \* \* \*

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<sup>a</sup>See General Order 101, A. G. O., series 1898.

4. Martial law is simply military authority exercised in accordance with the laws and usages of war. \* \* \*

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or if deemed necessary, the participation of the occupier or invader.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

That the military authorities of the United States are not prohibited by the Constitution or institutions of our Government from maintaining governments under requisite conditions, has been judicially determined by our Supreme Court. (*Cross et al. v. Harrison*, 16 How., 164, 193; *Leitensdorfer v. Webb*, 20 How., 176, 177.)

As to the government established in California, the court say:

The government, of which Colonel Mason was the executive, has its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. (16 How., 193.)

As to the government instituted in New Mexico, the court say:

Upon the acquisition, in the year 1846, by the arms of the United States of the Territory of New Mexico, the civil government of this Territory having been overthrown, the officer, General Kearney, holding possession for the United States in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional government for the acquired country. (20 How., 176, 177.)

Military government is the dominion exercised by a belligerent power over invaded territory and the inhabitants thereof. Such a government performs its functions and discharges its obligations by what is known as martial law.

Chief Justice Chase describes military government as a form of military jurisdiction—

to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents. (*Ex parte Milligan*, 4 Wall., 141.)

In this case Chief Justice Chase defined martial law as an authority called into action, when public necessity required it, in a locality or district, not of an enemy's country, but of the United States, and "*maintaining adhesion to the National Government.*" (4 Wall., 142.)

It will be seen that a military government takes the place of a suspended or destroyed *sovereignty*, while martial law or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty.

The occasion of military government is the expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion.

The occasion of martial rule is simply public exigency which may arise in time of war or peace.

A military government, since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions.

The power of such government, in time of war, is a large and extraordinary one, being subject only to such conditions and restrictions as the laws of war impose upon it.

As was said by the United States Supreme Court, such governing authority—

may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. \* \* \* In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace. (*New Orleans v. Steamship Co.*, 20 Wall., 394.)

Commenting on this view of the law, the Texas supreme court say:

This language, strong as it may seem, asserts a rule of international law, recognized as applicable during a state of war. (*Daniel v. Hutcheson*, 86 Texas, 61.)

That the power is measured and restricted only by the laws of war, see Sargeant on the Const., 330; 1 Kent's Com., 306; Flanders Expos. of Const., 169, 184; *Little v. Barreme*, 2 Cranch, 170; *State v. Fairfield*, 13 Ohio St., 377.

In ancient times governments of this character were administered according to the accepted doctrine. "The will of the conqueror is the law of the conquered." This doctrine is still recognized as a law of nations, but has been so modified by modern usage as to deprive it of its terrors.

When an army engaged in actual warfare drives out or destroys the former sovereignty of a country, the laws created by that sovereignty and dependent upon that sovereignty pass away with it. There also passes away the obligation of the inhabitants, theretofore owing allegiance to the deposed sovereignty, to obey the will of said sovereign—i. e., its laws.

Thereupon the necessity exists out of which arises martial rule. Martial rule, as exercised in any country by the commander of an invading army, is an element of the *jus belli*. It is incidental to a state of war and appertains to the law of nations. The commander of the occupying army rules the territory within his military jurisdiction, as necessity demands and prudence dictates, restrained by international law and obligations, the usages and laws of war, and the orders of his

superior officers of the government he serves and represents. (Hansard's Parliamentary Debates, 3d series, vol. 95, p. 80; Op. Att'y Gen., vol. 8, p. 369; Regulations for U. S. Army, Art. VI, sec. 65.)

The inhabitants are not released from the various obligations they owe each other and to the community. These are quite independent of their allegiance to the deposed sovereignty. These obligations must be discharged, and therefore the municipal laws of the country—the laws regulating the relations between individuals—are continued in force. Originally this was considered an act of grace on the part of the conqueror; but the practice is now so well established among civilized nations as to make it one of the “laws and usages of war.”

Although said laws continue in force, the authority of the officials who administered the laws under the previous sovereignty ceases, as of course, upon the assumption of control by the military forces of the invader. The further exercise of power by said officials is to be considered as by and with the authority of the military force maintaining the occupation.

Lieber's Instructions for the Government of Armies of the United States in the Field (sec. 1, par. 6), lays down the rule as follows:

All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law (military government) unless interrupted or stopped by order of the occupying military power; *but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law*, or continue only with the sanction, or if deemed necessary, the participation of the occupier or invader.

Military government—that is, the administration of the affairs of civil government exercised by a belligerent in territory of an enemy occupied by him—is not considered in modern times as doing away with all laws and substituting therefor the will of a military commander. Such government is considered as a new means or instrument for the execution of such laws, natural and enacted, international and domestic, as are necessary to preserve the peace and order of the community, protect rights, and promote the war to which it is an incident.

Under any government, if for any reason the usual and ordinary means of enforcing the laws and accomplishing the purposes of government are found inadequate to meet an existing emergency, resort may be had to martial rule in order to enforce the law and accomplish the purposes of government. Martial rule is intended to effectuate some law, not to abrogate all law. To illustrate: Private property may be taken or injured for public purposes. Ordinarily this is accomplished by the slow process of condemnation. Under martial rule the process is accelerated. If the necessity apparently exists, as in the presence of a conflagration, a building may be summarily destroyed or trespass committed without liability. Again, a man's life may be

taken if he is guilty of treason. Under the ordinary administration of the law the most notoriously guilty individual, captured red-handed, must be proceeded against by the slow process of the court. Under martial rule he is incontinently executed. It is the procedure which is dispensed with, not the law.

While a military government continues as an instrument of warfare, used to promote the objects of the invasion by weakening the enemy or strengthening the invader, its powers are practically boundless.

In *New Orleans v. Steamship Company* (20 Wall., 387, 394) the court say:

In such cases the conquering power has a right to displace the preexisting authority and to assume to such an extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid and apply them to its own use or otherwise. It may do anything *necessary to strengthen itself and weaken the enemy*. There is no limit to the powers that may be exercised in such cases, save those which are found in the laws and usages of war.

But when the war is ended and the military government ceases to be an instrument to promote actual warfare and devotes itself simply to civil affairs instead of military affairs, limitations at once attach. The reason for this rule is derived from the established doctrine that military government or martial rule is the creature of necessity, and its acts must be justified by necessity—real or apparent. (See *The Justification of Martial Law*, by G. Norman Lieber, Judge-Advocate-General, U. S. A., War Dept. Doc. No. 79.)

In *Ex Parte Milligan* (4 Wall., p. 2), the majority of the court held as follows (127):

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, \* \* \* on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; \* \* \* And so in the case of a foreign invasion martial rule may become a necessity in one state when, in another, it would be mere lawless violence.

In *Raymond v. Thomas* (91 U. S., 712) the court held void an order of General Canby issued May 28, 1868, whereby he undertook to annul the decree of a court of chancery in South Carolina. The court say:

It was an arbitrary stretch of authority needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power where the rights of the citizens are concerned shall never be pushed beyond what the exigency requires. Citing *Mitchell v. Harmony*, 13 How., 115; *Worden v. Bailey*, 4 Taunt., 67; *Fabrigas v. Moysten*, 1 Cowp., 161.

## II.

**THE TREATY OF PEACE BEING ENTERED INTO AND PROCLAIMED, MAY SAID  
MILITARY GOVERNMENTS LAWFULLY CONTINUE TO EXERCISE AUTHORITY  
IN CIVIL AFFAIRS?**

The military governments under consideration were established to deal with conditions resulting from successful invasion. As a result of that invasion the prior sovereignty had been expelled and the instruments and agencies of that sovereignty for the performance of the functions of civil government had been deprived of the authority theretofore exercised as the representatives of that sovereignty. Everywhere and at all times government of some kind is a necessity, and this necessity justifies and requires the continuance of the military government until there is established in said islands a civil government which comports with the interests and inclinations of the dominant power.

This question arose in the United States upon the exchange of ratifications of the treaty of peace with Mexico in 1848. Respecting the continued existence of the military governments established by the United States in New Mexico and Upper California, President Polk said:

The only government which remained was that established by the military authority during the war. Regarding this to be a *de facto* government, and that by the presumed consent of the inhabitants it might be continued temporarily, they were advised to conform and submit to it for the short intervening period before Congress would again assemble and could legislate upon the subject. (Message to Cong. Dec. 5, 1848; see Messages and Papers of the Presidents, vol. 4, p. 638.)

With reference to the same matter, Mr. James Buchanan, at that time Secretary of State, said:

The termination of the war left an existing government, a government *de facto* in full operation, and this will continue with the presumed consent of the people until Congress shall provide for them a Territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest. (See Ex. Documents, 2d sess. 30th Cong., Doc. No. 1, p. 48).

The continuance of the military government over California after peace was declared was considered by the Supreme Court of the United States in *Cross v. Harrison* (16 How., 164), and therein the court say (pp. 193, 194):

It was the government when the Territory was ceded as a conquest, and it did not case as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was

meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government; and the more so, as it was continued until the people of the Territory met in convention to form a State government, which was subsequently recognized by Congress under its power to admit new States into the Union.

That military government may legally continue *in bello cessante* equally *in flagrante bello* was the substance of the holding in *Lamar v. Brown*, 92 U. S., 187, 193, et seq. (See also *Leitensdorfer v. Webb*, 20 How., 176; *Dow v. Johnson*, 100 U. S., 168; *Texas v. White*, 7 Wall., 700; *The Grapeshot*, 9 Wall., 132; *Burke v. Miltenburger*, 19 Wall., 524; *Lewis v. Cocks*, 23 Wall., 469; *Mechanics' Bank v. Union Bank*, 22 Wall., 276; *Pennywitt v. Eaton*, 15 Wall., 382.)

The course pursued by the Congress of the United States at the close of the civil war establishes the acceptance by Congress and this nation of the doctrine that military government may continue after the cessation of hostilities and until the purposes for which the war was entered upon, or rendered obvious by the war, are accomplished.

As regards private rights the civil war ended August 20, 1866. (*McKee v. Rains*, 10 Wall., 22; *United States v. Anderson*, 9 Wall., 561; *McElrath v. United States*, 102 U. S., 426.)

As regards public matters there were two proclamations made by the President declaring that the war had closed—one issued April 2, 1866 (14 Stat. L., 811), embracing all the late rebellious States excepting Texas, and the other issued August 20, 1866 (14 Stat. L., 814), embracing Texas.

The Executive undertook to place the States which had engaged in the rebellion on a footing of equality with the other States of the Union. Congress antagonized this position and passed what are known as the "reconstruction acts." (14 Stat. L., 428; 15 Stat. L., 14.) These acts provided for military government possessing sovereign powers to be exercised by martial rule in the several States mentioned. For this purpose said act required:

That said rebel States shall be divided into military districts and made subject to the military authority of the United States. (14 Stat. L., 428.)

The powers given to the district commanders were as follows (sec. 3, chap. 30, 14 Stat. L., 428):

SEC. 3. *And be it further enacted*, That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace, and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or when in his judgment it may be necessary for the trial of offenders he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void.

The reason for such government was declared by the preamble as follows:

Whereas no legal State governments or adequate protection for life or property exist in the rebel States of [naming them]; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be established: Therefore.

The Supreme Court refused to interfere with the enforcement of said reconstruction acts or the exercise of the authority conferred thereby. (*State of Mississippi v. Johnson*, 4 Wall., 475; *State of Georgia v. Stanton*, 6 Wall., 50; *Handlin v. Wickliffe*, 12 Wall., 174; *White v. Hart*, 13 Wall., 646.)

The court held that this legislation was political in character, and therefore outside the jurisdiction of the judicial department; that in creating such legislation Congress exercised certain of the sovereign powers of the nation which exist, but are reserved to the people by the Constitution. No one ever claimed that the government created by this legislation was that provided for by the Constitution of the United States for the States of the Union. It found its legal justification in being an exercise of the inherent right of national sovereignty to adequately deal with a national emergency.

The situation then existing is thus described by Birkhimer:

But it was also true that the civil governments in the late insurrectionary States were inimical to the Union; that society there was in a dangerously disordered condition; that deep-seated enmity was at this period entertained by the leading people toward important principles of governmental policy which those who had saved the Union had resolved should be incorporated into the Constitution. (Fourteenth amendment.) Technically it might be termed "time of peace," but in reality it was far different, as that phrase is generally understood. (*Military Government and Martial Law*, 1 ed., p. 388.)

In Texas the military government installed under the reconstruction acts continued until April 16, 1870. Prior to the passage of the reconstruction acts in 1867 the people of Texas called a constitutional convention, which convened on February 7, 1866, and so amended the constitution of the State as to meet the changed condition of affairs brought about by the result of the war and the fourteenth amendment to the Constitution of the United States. These amendments were ratified by the people. All officers provided for by the State constitution were elected and entered upon the discharge of their respective duties. The legislature met and passed laws and the State government was again administered by officers holding under the terms of the constitution; all the courts were held by judges elected as the constitution prescribed, and county and municipal officers selected in the same manner entered upon the discharge of their duties. But the reconstruction act of March 2, 1867, declared that no legal State government existed in Texas, and provided further for the military government of said State. The officers elected under the constitution



were removed from office and others appointed in their places. Among them the governor of the State, elected under the constitution as amended in 1866, was displaced and a provisional governor was appointed and held the office until September 30, 1869, when he resigned, and from that time until January 8, 1870, the executive duties were performed by an adjutant of the general in command, placed in charge of civil affairs. On April 16, 1870, by General Orders, No. 74, the military commander declared the State had resumed practical relations to the General Government, and all the authority conferred upon him by the reconstruction laws was remitted to the civil authorities.

In discussing this phase of military government, Pomeroy says:

“Military government” is the authority by which a commander governs a conquered district when the local institutions have been overthrown and the local rulers displaced, and before Congress has had an opportunity to act under its power to dispose of captures or to govern territories. This authority in fact belongs to the President, and it assumes the war to be still raging and the final status of the conquered province to be undetermined, so that the apparent exercise of civil functions is really a measure of hostility. “Martial law” is something very different. It acts, if at all, within the limits of the country, against civilians who have not openly enrolled themselves as belligerents among the forces of an invading or a rebellious enemy. (Pomeroy’s Constitutional Law (Bennett’s Third Ed.), par. 712, p. 595.)

Birkhimer says (p. 290):

The experience of the United States Government but adds to the evidence derivable almost universally from the history of other nations that military government ceases at the pleasure of him who instituted it, upon such conditions as he elects to impose, and that its termination is not in point of time coincident, either necessarily or generally, with the cessation of hostilities between the contending belligerents.

It therefore appears that the continuance of military government in said islands after the exchange of ratifications of the treaty of peace with Spain is in harmony with the theory heretofore accepted and approved by the executive, legislative, and judicial branches of the Government of the United States.

### III.

#### **THE EFFECT OF THE TREATY OF PEACE UPON THE CHARACTER AND EXTENT OF THE AUTHORITY OF THE MILITARY GOVERNMENT IN PORTO RICO, CUBA, AND THE PHILIPPINE ARCHIPELAGO.**

The conditions existing in Porto Rico, Cuba, and the Philippine Archipelago are not identical, and therefore the several military governments thereof must be separately considered.

#### **PORTO RICO.**

Upon the ratifications of the treaty of peace being exchanged, the sovereignty and jurisdiction of the United States permanently attached to Porto Rico and the island became territory appertaining to the

United States. The United States is in undisputed possession of the island, and therefore the military government of Porto Rico has ceased to occupy the place of the suspended or expelled sovereignty of Spain and has become an instrument of the new sovereignty. It has become the *representative* of sovereignty instead of a *substitute*. Since hostilities have ceased in Porto Rico, it follows that the military government is not authorized to adopt measures seeking to promote the success of military operations nor to justify its action on that ground.

As to Porto Rico the war has ended and the purposes of the military operations therein have been accomplished, that is to say, a complete conquest has been effected and a peace secured. Therefore in that island the United States is no longer a belligerent, and it follows that the existing government therein no longer exercises its powers by virtue of belligerent right.

Regarding the provisional government maintained in California and New Mexico after the treaty of peace with Mexico, President Polk said:

Upon the exchange of ratifications of the treaty of peace with Mexico, the temporary governments which had been established over New Mexico and California \* \* \* by virtue of the rights of war ceased to derive any obligatory force from that source of authority. (Message to Congress, December 5, 1848; see Ex. Doc. No. 1, p. 12, Thirtieth Congress, second session.)

James Buchanan, then the Secretary of State said:

By the conclusion of the treaty of peace the military government which was established over them, under the laws of war as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. (Ibid., p. 48.)

Halleck says:

There can be no doubt that when the war ceases the inhabitants of the ceded territory cease to be governed by the code of war. Although the government of military occupation may continue, the rules of its authority are essentially changed. It no longer administers the laws of war, but those of peace. The governed are no longer subject to the severity of the code military, but are remitted to their rights, privileges, and immunities under the code civil. (Halleck's Int. Law, 3d ed., vol. 2, chap. 34, par. 18, p. 487.)

In time of war the military dominates all other branches of the Government. During the time and in the locality of military operations of actual war the laws of peace are suspended and the most cherished rights of individuals and communities may be ignored or obliterated should the exigencies of the military situation actually or apparently require it. Such is the right of a nation in the presence of the perils of war. Such is the power conceded a belligerent by the established usage of nations.

A treaty of peace being entered into, the perils of war pass away as does also the right of the military to exercise the undefinable, illimitable power of belligerency; the laws of peace are again operative; and

the rights of individuals and communities are again entitled to recognition and protection.

The difference in the extent of power when used by a military government for the purpose of promoting actual warfare and when used in time of peace for the administration of the affairs of peace is shown by a number of decisions of the Supreme Court of the United States.

In *The Grapeshot* (9 Wall., 129) it was held that:

When, *during the late civil war*, portions of the insurgent territory were occupied by the National forces it was within the constitutional authority of the President, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States, and the provisional court for the State of Louisiana, organized under the proclamation of October 20, 1862, was therefore rightfully authorized to exercise such jurisdiction. (Syllabus.)

In the body of the opinion the court say (page 133):

We have no doubt that the provisional court of Louisiana was properly established by the President in the exercise of his constitutional authority *during war*.

In *ex parte Milligan* (4 Wall., 2) it was held that the military court which in 1864 tried Milligan for treason was without jurisdiction, for the reason that said court sought to exercise jurisdiction in the State of Indiana, which State was not the theater of actual warfare; and, as the courts of that State were open, they alone had jurisdiction. In the majority opinion the court say (p. 121):

But it is said that the jurisdiction is complete under the "laws and usages of war." It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the Government, and where the courts are open and their process unobstructed.

The court further say (p. 127):

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then, on the theater of active military operations, where war really prevails*, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one State where in another it would be mere lawless violence.

In *Leitensdorfer et al. v. Webb* (20 How., 176) it was held that *during the war with Mexico* and upon the acquisition of the Territory

of New Mexico, in 1846, the executive authority properly established a provisional government, which ordained laws and instituted a judicial system, which continued in force after the war as an existing instrumentality of an existing or *de facto* government.

In *Ex parte Milligan* (4 Wall., 2) the court were unanimous as to the want of authority in the military court which tried the case. The court were divided as to the power of Congress to confer authority upon such a tribunal. Upon the matter on which the court agreed, I quote the following from the dissenting opinion of the Chief Justice and Wayne, Swayne, and Miller, JJ. (pp. 139, 140):

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress can not direct the conduct of campaigns, nor can the President or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenders, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature. We by no means assert that Congress can establish and apply the laws of war where no war had been declared or exists. Where peace exists the laws of peace must prevail.

In *Jecker et al. v. Montgomery* (13 How., 498) the facts were that during the war with Mexico the *Admittance*, an American vessel, was seized in a port of California April 7, 1847, by the commander of a war vessel of the United States upon suspicion of trading with the enemy. She was condemned as a lawful prize June 1, 1847, by the chaplain of one of the war vessels upon that station, who had been authorized by the President to exercise admiralty jurisdiction in cases of capture. The owners of the cargo filed a libel against the captain of the vessel of war in the admiralty court for the District of Columbia. It was held that the condemnation in California was invalid as a defense for the captors, as the prize court established in California was not authorized by the laws of the United States or the laws of nations. In the opinion the court say (p. 515):

Neither the President nor any military officer can establish a court in a conquered country and authorize it to decide upon the rights of the United States or of individuals in prize cases, nor to administer the laws of nations.

The courts established or sanctioned in Mexico during the war by the commander of the American forces were nothing more than the agents of the military power to assist it in preserving order in the conquered territory and to protect the inhabitants in their persons and property while it was occupied by the American arms.

In *Texas v. White* (7 Wall., 700) it was held that authority to provide for the restoration of State governments when subverted and overthrown is derived from the obligation of the United States, under the Constitution, to guarantee to every State in the Union a republican form of government. (Art. 4, sec. 4.) So long as the war con-

tinued the President might institute temporary government within insurgent districts occupied by the national forces or take provisional measures in any State for the restoration of State government faithful to the Union, employing such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress.

In the opinion the court say (p. 729):

Almost immediately after the cessation of organized hostilities, *and while the war yet smoldered* in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the reestablishment of a republican government. \* \* \* A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions as commander in chief; and *so long as the war continued* it can not be denied that he might institute temporary government within insurgent districts occupied by the national forces, or take measures in any State for the restoration of State government faithful to the Union, employing, however, in such efforts only such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. (See also *Luther v. Borden*, 7 How., 42.)

The supremacy of military authority over the civil authority in the administration of the affairs of government is repugnant to the principles upon which stands the Government of the United States, and the theories of government cherished by the people of this nation and the race to which we belong. From the struggle which forced Magna Charta from an unwilling sovereign to that which compelled the Crown of Spain to relinquish sovereignty in Cuba, the Anglo-Saxon race has never varied from its adhesion to the principle that the military was the subjected, and not the dominant, branch of government, save only amid the clash of arms or on other occasions when the government is called upon to exercise the right of self-defense conferred by the law of self-preservation.

It would seem, therefore, that the paramount purpose of a military government, after the war ceased, should be to create conditions which would enable the civil branch to assume the ascendancy in the affairs of civil government, in kind if not in degree, with the paramount purpose during the war of promoting the success of its sovereign's military operations.

There are certain obvious consequences respecting Porto Rico, resulting from the war with Spain, which it may be well to consider.

The transfer of sovereignty from Spain to the United States, whether accomplished by the conquest or the treaty of peace, requires a determination of the relation to the Government of the United States sustained by the inhabitants of the island and by the government of

the island. Neither the military government of the island nor the executive branch of the Government of the United States has jurisdiction to make this determination. As to the inhabitants the treaty provides (Art. IX):

The civil rights and political status of the native inhabitants \* \* \* shall be determined by the Congress.

The authority to determine what relation the permanent government of Porto Rico shall sustain to the Federal Government of the United States is also vested in Congress.

The history of our country is not without instances of attempts by the executive branch of our Government to anticipate the action of Congress in the determination of the relations between the Federal Government and the civil government in territory subject to military occupation; notably the instances of Upper California and New Mexico and the States which engaged in the rebellion and associated themselves as the Confederate States of America.

In these instances Congress refused to recognize the actions taken pursuant to Administrative or Executive authorization. In the instance of California the action of Congress was such that President Taylor sent a message to that body disclaiming all responsibility in the matter. (Message to 31st Cong. dated Jan. 21, 1850; Ex. Doc. No. 17, 1st sess. 31st Cong.)

In 1863 President Lincoln undertook to weaken the rebellion by the formation of loyal State governments in the rebellious districts, and for this purpose issued a proclamation December 8, 1863, inviting the people to form such governments under conditions set forth in the proclamation. (13 Stat. L., 738.) This was clearly a war measure. Pursuant to the request of President Lincoln, State governments were formed in Louisiana and Arkansas early in 1864 and in Tennessee early in 1865. To the State executives thus chosen were given the powers theretofore exercised by the military governors previously appointed by the President. Congress declined to recognize the governments so organized; and the Senators and Representatives elected thereunder were denied seats in the respective Houses.

Those were the last governments organized, while the war of the rebellion continued, in territory occupied by rebels treated as belligerents. They were the first efforts toward a reconstruction of State governments in insurgent territory. Their organization caused the first decided antagonism between the Executive and Congress growing out of the conduct of the war. The continued efforts of the succeeding Executive to secure Congressional recognition of these governments as sustaining the relation of component parts of the Union resulted in a controversy which culminated in the extraordinary proceeding of impeachment.

The views entertained by Congress as to the attempts of the Execu-

tive to institute permanent governments in the territory subject at that time to military occupation were fixed among the institutions of our Government by what are known as the "reconstruction acts." By the act of March 2, 1867, said governments were denounced as illegal, subjected to military control, and declared to be provisional only. 14) Stat. L., 428.)

There exists an obvious necessity of creating and establishing a permanent civil government in Porto Rico. The authority necessarily to be exercised in accomplishing this work is vested in Congress. Porto Rico is now a conquest, or property seized as a spoil of war, and held to reimburse this nation for the loss of blood and treasure occasioned by the war, and to deter other nations from engaging in war with the United States.

The Constitution provides as follows:

The Congress shall have power \* \* \*

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; \* \* \*

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof. (Art. I, sec. 8.)

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. (Art. IV, sec. 3.)

The creation of a permanent civil government for Porto Rico calls for the exercise of legislative powers; and the Constitution provides that—

All legislative powers herein granted shall be vested in Congress. (Art. I, sec. 1.)

Halleck's International Law (3d ed., vol. 2, chap. 34, par. 16, p. 483) says:

The right of the King to change the laws of a conquered territory *after the war*, results, according to the decisions of the English courts, from his constitutional power to make a treaty of peace, and consequently to yield up the conquest, or to retain it upon whatever terms he pleases, provided those terms are not in violation of fundamental principles. But the President of the United States can make no treaty without the concurrence of two-thirds of the Senate, and his authority over ceded conquered territory, though derived from the law of nations, is limited by the Constitution and subordinate to the laws of Congress. It, however, is well settled by the Supreme Court, that, as constitutional commander in chief, he is authorized to form a civil or military government for the conquered territory during the war; and that when such territory is ceded to the United States, as a conquest, the existing government so established does not cease as a matter of course or as a consequence of the restoration of peace; that, on the contrary, such government is rightfully continued after the peace and until Congress legislates otherwise. \* \* \* So long as that government continues \* \* \* it represents the sovereignty of the United States, and has the legal authority to enforce and execute the laws which extend over such territory. Congress may at any time put an end to this government of the conquered territory, and organize a new one. \* \* \* The power of Congress over such territory is clearly exclusive and universal.

It is undoubtedly true that the military government of civil affairs in Porto Rico will continue to be administered by martial rule and that martial rule includes authority to deal with each necessity that may arise. In attempting to apply this broad rule it must be remembered that "necessity," as used in connection with the justification of martial rule, means that which is essential or indispensable to the accomplishment of a required purpose.

What are the purposes required of the existing military government of Porto Rico? To the writer it appears that since said government has ceased to be an instrument of actual war, its purposes are (1) to promote conditions which will justify the transfer of the administration of civil affairs to the civil branch of the government; (2) to preserve peace and order in the island, i. e., police the territory until Congress shall have an opportunity to effect the legislation required by the conditions existing in that territory.

To accomplish these purposes the most potent means available to the military government is the military force placed at its disposal. Next in importance are the various agencies of civil government subject to its direction and control and the police power of a State. The methods and procedure to be followed in attempting to accomplish these purposes are those available under the laws continuing in force in the island, supplemented by the military orders of legislative character issued during the existence of the war.

The powers derived from these sources are not sufficient to cope with all matters which may properly be the subject of governmental action when permanent government is established. There are undoubtedly rights to be released and conferred, abuses to be corrected, wrongs to be righted, and many public undertakings to be entered upon; but such is also the existing condition in the United States and all other countries. These await the orderly progress of the agencies of government created by the Constitution, which deal with them as best they can, often inadequately it is true; but a military government is by no means a short cut to the millenium.

A military government installed by the United States in territory ceded and held as a conquest, is required, in time of peace, to execute the laws in force in the territory subject to its jurisdiction. The question therefore arises as to what laws are in force in Porto Rico.

1. I have heretofore referred to the general doctrine that the inhabitants of territory subject to military occupation or held as a ceded conquest are governed in their relations *inter se* by the municipal laws of such territory in force at the time of the cession or conquest. Said laws, while they are not suspended or abrogated by the fact of military occupancy, may be suspended or altered by the conqueror during the period of the war when he exercises the power of supreme legislator as a belligerent right. (See Halleck's Int. Law, 3d ed., chap. 34, sec. 18.)



It is therefore necessary to determine what laws remained without modification when the war ended, and what modifications had been made.

2. It is also necessary to consider that upon the occupied territory being ceded to the United States all of the laws of the former sovereignty which were incompatible with the character and institutions of our Government became null of force and void of effect. (Chi., *R. I. & P. Ry Co. v. McGlinn*, 114 U. S., 542, 546; *Am. Ins. Co. v. Canter*, 1 Pet., 542; *More v. Steinbach*, 127 U. S., 70, 80.)

In *Railway Co. v. McGlinn* the court say (p. 546):

It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.

Among other laws which pass away with a surrendered sovereignty are those relating to the alienation of public property.

In *More v. Steinbach* (127 U. S., 70, 81) the court say:

The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. That doctrine has no application to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject. (See also *Ely's Admr. v. United States*, 171 U. S., 220, 230; *United States v. Vallejo*, 1 Black, 541; *Harcourt v. Gailliard*, 12 Wheat., 523.)

3. While the municipal laws of newly acquired territory not in conflict with the laws of the new sovereign continue in force without the expressed assent or affirmative act of the conqueror, the political laws do not. (Halleck's *Int. Law*, chap. 34, par. 14.) However, such political laws of the prior sovereignty as are not in conflict with the constitution or institution of the new sovereignty may be continued in force, if the conqueror shall so declare by affirmative act of the

commander in chief during the war, or by Congress in time of peace. (Ely's Administrator *v.* United States, 171 U. S., 220, 231.)

4. The laws of the new sovereignty which *proprio vigore* extend over the newly acquired territory.

The administrative branch of this Government, believing that the power of extending the existing laws of the United States over the territories acquired by the late treaty of cession with Spain is lodged in Congress, that belief must be assented to and respected by the military governments of said territory.

5. The provisions of the treaty of peace and cession and the obligations of international law are binding upon the military government, not only in a national sense, but also as they affect the rights of individuals. (Ex Parte Cooper, 143 U. S., 472; Whitney *v.* Robertson, 124 U. S., 190; Edye *v.* Robertson, 112 U. S., 580.)

6. An officer of the United States acting as a military governor is bound to obey the orders of his superior officers, and to conform to such rules, regulations, orders, and instructions as the home Government is authorized to make, either by virtue of its own laws and principles of government or by the general law of nations.

7. The military government of Porto Rico may exercise the "police power" of a State.

It may be well to call attention to the fact that the officers of the United States Army who are acting as governors and other executive officers of the governments being maintained by the United States in the territories ceded and relinquished by Spain are officials of the United States, and derive their authority from this Government, and not from the Crown of Spain. The right to exercise certain royal prerogatives which had been possessed by the officers of Spain did not pass to the officers of the United States.

In *Munford v. Wardwell* (6 Wall., 423, 435) the court held:

Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. Municipal authority also was exercised for a time by subordinate officers appointed by our military commanders. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the department. By virtue of that supposed authority Gen. S. N. Kearney, March 10, 1847, as military governor of the territory, granted to the town of San Francisco all the right, title, and interest of the United States to the beach and water lots on the east front of the town, included between certain described points, excepting such lots as might be selected for government use. \* \* \*

But the power to grant lands or confirm titles was never vested in our military governors; and it follows as a necessary consequence that the grant as originally made was void and of no effect. Nothing passed to the town by the grant, and, of course, the doings of the alcalde in selling the lot in question was a mere nullity.

In letter to the Secretary of War dated July 10, 1899, Attorney-General Griggs (22 Op., 527) says:

By well-settled public law upon the cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which

are designated as municipal continue in force and operation for the government and regulation of the affairs of the people of said territory until the new sovereignty imposes different laws or regulations.

Those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace, or discretion of the former sovereign would probably be held to be ineffective under the succeeding power.

Whether or not the prerogative rights of the sovereign of Spain passed by the cession to the sovereign people of the United States, it is not necessary to discuss. The Federal Government of the United States derives such powers as it possesses from the people, by and through the Constitution, wherein said powers are enumerated.

As was said in *Pollard's Lessee v. Hagan* (3 How., 225):

It can not be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them.

It is important to ascertain whether or not the head of the military government of Porto Rico may now exercise the power of legislation. In time of war and in territory affected by military operations undoubtedly the head of a military government may exercise this power. War no longer exists in Porto Rico. The sovereignty of the United States has attached permanently to the island, and the Government of the United States is in peaceable possession of the territory. The right to legislate therefor now belongs to Congress, and I see no reason for asserting that the jurisdiction of Congress has been suspended or Congress in any way incapacitated for exercising this right. It is the inability of the duly authorized agency of government to perform its proper function which authorizes the performance of that function by martial rule. As to legislation for Porto Rico, this justification can not be asserted.

Notwithstanding this want of authority to legislate, the head of the military government of civil affairs in Porto Rico is at liberty to issue military orders which the inhabitants are bound to obey. His warrant therefore is the *vis major* at his command and constitutes an authority akin to the police power of a State. Therefore such orders should relate exclusively to the internal or domestic affairs of the island. These orders differ from legislation in that they lack abiding force or permanency, since their force would cease upon the military government being withdrawn, unless Congress, by appropriate action, should continue them in force and effect.

In respect of the exercise of this authority, it is necessary for those charged with the high duty of administering military government to bear in mind that a military government in time of peace is not only

a lawful government, but also a government of law, and that law is—to quote Blackstone—

a rule of civil conduct prescribed by the supreme power of the state; \* \* \* not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal.

It is also important to ascertain if the head of the military government of Porto Rico may exercise the powers of the judicial branch of government. The functions performed by the judiciary are essential to good government, and therefore must be performed in Porto Rico. The jurisdiction to exercise judicial authority in territory to which the sovereignty of the United States has attached differs from that of legislation, in that the jurisdiction to legislate is conferred upon Congress by the fact of the sovereignty attaching, while the Federal courts of the United States, being dependent upon Congress for their territorial and other jurisdiction, must await appropriate action by Congress for jurisdiction over newly acquired territory. Meanwhile the necessity for judicial action continues, and the military government is called upon to meet the necessity. Article XII of the treaty of peace (1898) clearly contemplates that the ordinary courts of the prior government will continue in existence, and such is the usage of nations. If these courts are found inadequate to deal with the domestic or internal situation arising by reason of the questions involved in the relations sustained by the inhabitants of the island, *inter se*, I am of opinion that the head of the military government of the island would be authorized to discharge the necessary functions, and to accomplish said purpose may designate instruments therefor, to wit, courts. As shown by the decision of the Supreme Court of the United States, these courts in Porto Rico could not be authorized by the President to pass upon rights possessed by the United States, nor could they be given jurisdiction in admiralty matters. Their powers must be confined to internal and domestic matters, such as are controlled by the laws regulating the personal relations which the inhabitants sustain to each other as individual members of society.

Governor Claiborne as the head of the military government in Louisiana and Major-General Jackson as military governor of East and West Florida, in time of peace, exercised the powers of the legislative and judicial branches of the government. Jackson declared enacted a large number of statutes, several of which were subsequently repealed by Congress, and as the supreme court and chancellor of the territory he heard and determined a number of cases brought before him. But it is important to remember that Congress by legislative enactment had authorized the exercise of the legislative and judicial power by the executive branch of the military government in Louisiana and Florida.

## CUBA.

The conditions existing in Cuba differ materially from those prevailing in Porto Rico, as do also the powers of the military government.

The sovereignty of Spain has been withdrawn from Cuba, but the sovereignty of the United States has not attached thereto, and the sovereignty, declared by Congress to be possessed by the people of the island, remains dormant. Under these conditions the military government of Cuba continues to be a substitute for sovereignty, as though the question of sovereignty were still pending the outcome of a war. It appears to the writer that under this condition the military government of Cuba may exercise such powers of sovereignty as are necessary for the successful conduct of the internal affairs of government, subject to the restraints imposed by the ideas and theories of government prevailing under the sovereignty by which it was created and the orders of the superior officials and authorities of the sovereignty by which said military government is sustained. (Regulations for United States Army, Art. VI, sec. 65.)

It must also be considered that the purposes respecting Cuba for which the war powers of the Government of the United States were called into activity and the military forces of the United States sent into that island are not yet accomplished. Congress, in the exercise of the great sovereign powers possessed by the United States as a member of the family of nations, directed the commander in chief of our military forces to employ the military branch of our Government (a) to compel Spain to relinquish sovereignty in Cuba; (b) to effect the pacification of the island; (c) to enable the inhabitants of Cuba to establish a stable, independent government.

These purposes were declared and the order for their accomplishment issued to the commander in chief by the adoption of the following resolution:

JOINT RESOLUTION for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battle ship with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and can not longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

• *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

First. That the people of the island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

Approved April 20, 1898.

(30th U. S. Stats., pp. 738, 739.)

Let us suppose that the Crown of Spain had seen fit to peaceably relinquish sovereignty in Cuba and turn over its subjects in the island, their personal and property rights, and the public property belonging to the Spanish Government situate in Cuba, to the care of the United States, relying upon the declaration of Congress that the United States would accomplish the pacification of the island and erect therein a stable, independent government. Would not the commander in chief of the military force charged with carrying out such declaration rightfully exercise such powers of a belligerent as were necessary to accomplish the undertaking?

Instead of pursuing the course supposed, Spain elected to go to war. Congress thereupon declared the war existing, by the passage of the following act:

AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect.

Approved April 25, 1898.

(30th U. S. Stats., p. 364.)

As directed to do by this act, the Commander in Chief of the Army and Navy proceeded to carry on the war so declared to exist, and compelled Spanish sovereignty to withdraw from Cuba and the Government of Spain to sue for peace. This war was a mere incident to the accomplishment of the purposes declared by the Congressional resolution of April 20, 1898. It was an obstacle encountered by the Commander in Chief in carrying out the order given him by Congress in

said resolution. But said order was not complied with nor the work ended to which the people of the United States had devoted the Army and Navy, when Spanish sovereignty was expelled. The pacification of the island was yet to be effected. The prejudices, animosities, hatreds, strifes, resulting from many years of internal warfare, were to be allayed and the inhabitants molded into a homogeneous whole on which the foundations of a nation might rest, and thereafter a government constructed which would give to the island and its inhabitants peace, prosperity, and the largest degree of liberty consistent with the maintenance of individual rights and collective tranquillity.

As from time to time the sovereignty of Spain was forced to abandon the various sections of said island and the territory became subject to military occupation by the forces of the United States, there was installed a government of civil affairs in said sections, whereby was maintained the protection of individual and property rights for which governments are established. Eventually said government extended over the entire island.

If the doctrine is correct that a military government is a substitute, *ad interim*, for sovereignty, and further, that the purposes for which the military forces of the United States were sent into Cuba are uncompleted, it would seem to follow that said military government may properly exercise the rights of a belligerent without regard to the fact that the war has ended.<sup>a</sup>

Speaking of the powers exercised by the officer in command in Texas under the reconstruction acts, the supreme court of Texas say:

In Texas this officer exercised powers legislative and executive, if not judicial. (*Daniel v. Hutcheson*, 86 Texas, 57.)

In the same case the court say:

That the State was governed by military law, even though its own laws may to some extent have been recognized and administered, must be considered an established fact.

The power of the United States Government to impose such a rule upon the State must be recognized as fully, under the facts existing, as though Texas had theretofore been an independent sovereignty, having no relation to the United States than that usually sustained by one independent nation to another.

Civil war had existed of magnitude seldom exceeded, resulting in the overthrow by force of arms of the cause the State had espoused and the occupation of her territory by a hostile army.

This occupancy was continued, and under the laws of war furnished ground for the establishment of military law. (66 Texas, p. 60.)

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<sup>a</sup> In letter to Secretary of War, dated September 8, 1900, the Attorney-General says: "Cuba, therefore, rightly continues to be governed under the law of belligerent right. \* \* \* According to the law of belligerent right \* \* \* the conqueror may make such new laws, rules and regulations as he sees fit." (*See post.*, 370.)

In another case the supreme court of Texas, in speaking of the reconstruction acts, say:

The National Legislature used its legitimate powers with moderation and magnanimity, endeavored to encourage the formation of republican governments in these States and bring the people back to a due appreciation of the law and of the liberty which is secured to the free enjoyment of every citizen under the Constitution. (33 Texas, 570.)

It is true that the authority to exercise the legislative and judicial authority was conferred upon the officers in command of the several military districts created by the reconstruction acts, by Congress; yet when the war powers of the nation are called into action, the Commander in Chief of our military forces may confer a like authority, in territory affected by military operations, upon the military commanders.

#### IV.

#### SHOULD CONGRESS BE INVOKED TO ASSUME DIRECTION AND CONTROL IN THE CONDUCT OF THE MILITARY GOVERNMENT OF CUBA?

If the President of the United States were not the Commander in Chief of the Army and Navy, he would have little, if any, authority to participate in the government of civil affairs in Cuba. Such authority as he possesses in connection with said government belongs to and is to be exercised by the Commander in Chief of the military forces of the United States. This results from the fact that the only powers of the United States which anyone is authorized to exercise in the island of Cuba are the war powers of this nation; and the only instrument or agency of the United States authorized by Congress or by our theory of government to exercise said war powers in Cuba is the military arm or branch of the Government of the United States.

As a general proposition, it is true that wherever the sovereignty of the United States attaches the Congress may prescribe the ways and means, the manner, and methods by which such sovereignty is to be asserted.

This presents the inquiry: *Has the sovereignty of the United States attached to Cuba?* Did not the resolution of Congress passed April 20, 1898, recognize and declare that the sovereignty of the island was in the people of Cuba and further that the United States disclaimed the right or intention of securing, assuming, or exercising sovereignty in Cuba? Is not Congress, by its own acts, estopped from legislating in regard to the affairs of civil government in Cuba?

The character of the military government now being maintained in Cuba has been discussed at length for the purpose of showing that it continues to derive its powers from the laws and usages of war, if not *flagrante*, at least *nondum cessante bello*. If this proposition is correct, it follows that the Commander in Chief in conducting said government exercises the right of a belligerent. In other words, the operations of



said government are to be considered as being the same as the military operations of a belligerent. What power has Congress to direct the operations of our military forces engaged in the conduct of a war in a foreign country?

Chief Justice Chase, in the minority opinion in *Ex parte Milligan*, said (4 Wall., 139):

Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns*. That power and duty belong to the President as Commander in Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, *nor Congress upon the proper authority of the President*.

Of necessity, a military government resorts to martial rule, or martial law. Should Congress undertake to legislate for a military government and prescribe the rules and regulations of its conduct, Congress would enter upon the dangerous undertaking of giving to martial law the sanction and fixed character of legislative enactment. Under our theory of government martial rule, whether exercised by a military government or the military arm of a civil government, arises from necessity, ceases with the necessity, and during its continuance its every act must be justified by necessity. Herein is to be found the safeguard against the arbitrary exercise of military power in time of martial rule. The military person exercising power under martial rule is liable to be called before the courts, after martial rule has ceased, and required to justify his action by showing the necessity therefor or respond in damages.

In *Mitchell v. Harmony* (13 How., 115, 134) the court say:

But we are clearly of opinion that in all of these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

But if Congress has the authority and shall exercise it and make martial rule the subject of legislation, then the justification of the acts of persons enforcing martial rule becomes a question of law and not of necessity. The legislative act would be a justification which could not be impeached, and the person injured would be without remedy. (Cooley's Constitutional Law, p. 148; *Griffin v. Wilcox*, 21 Ind., 370;

Johnson v. Jones, 44 Ill., 142; Hare's American Constitutional Law, vol. 2, p. 968; Pomeroy's Constitutional Law, sec. 709 et seq.)

If Congress regulates the exercise of that military power over civil rights which we call martial law, the military person who acts within the limits of such legislation would be protected by it, for the act of Congress would be an exercise of its political power, and the necessity therefor or the expediency thereof could not be inquired into by the courts.

Bennett's edition of Pomeroy's Constitutional Law lays down the rule as follows:

This military law—or, in other words, this code of positive, enacted, statutory rules for the government of the land and naval forces—is something very different from martial law, which, if it exists at all, is unwritten, a part and parcel of the means and methods by which the Commander in Chief may wage effective war, something above and beyond the jurisdiction of Congress; for that body has no direct authority over the actual conduct of hostilities when war has been initiated. (Sec. 469, p. 385.)

The same author further says:

When actual hostilities have commenced, either through a formal declaration made by Congress or a belligerent attack made by a foreign government which the President must repel by force, another branch of his function as Commander in Chief comes into play. He wages war; Congress does not. The Legislature may, it is true, control the course of hostilities in an indirect manner, for it must bestow all the military means and instruments; but it can not interfere in any direct manner with the actual belligerent operations. Wherever be the theater of the warlike movements, whether at home or abroad, whether on land or on the sea, whether there be an invasion or a rebellion, the President as Commander in Chief must conduct those movements; he possesses the sole authority and is clothed with the sole responsibility. (Sec. 706, p. 591.)

#### PHILIPPINE ARCHIPELAGO.

The Philippine Archipelago was not included in the Congressional resolution approved April 20, 1898, and the military government established in those islands was originally an instrument for promoting the war with Spain. Although the United States has acquired the rights of sovereignty over those islands, it has not entered into peaceable and undisputed possession thereof. In establishing that possession it encounters an armed insurrection, against which it is conducting military operations and with the forces of which it is engaged in active hostilities. The military government of the islands has been continued and is now utilized as a means of suppressing said armed insurrection, and therefore is authorized to exercise the rights of a belligerent.

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The Secretary of War approved the views set forth in the foregoing report, and the policy of the War Department, in respect of said military governments, has accorded with the principles discussed and conclusions reached therein.

[Case No. 144, Division of Insular Affairs, War Department.]

**LEGAL STATUS OF THE TERRITORY AND INHABITANTS OF THE ISLANDS ACQUIRED BY THE UNITED STATES DURING THE WAR WITH SPAIN, CONSIDERED WITH REFERENCE TO THE TERRITORIAL BOUNDARIES, THE CONSTITUTION, AND LAWS OF THE UNITED STATES.**

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SIR: In response to your request, I have the honor to report upon the following questions of law:

1. Have the territorial boundaries of the United States been extended to embrace the islands of the Philippine Archipelago, the island of Guam, and the island of Porto Rico?

2. Are said islands and their inhabitants bound and benefited, privileged and conditioned by the provisions of the Constitution of the United States?

3. Has the Congress of the United States jurisdiction to legislate for said islands and their inhabitants?

4. Must such legislation conform to the constitutional requirements regarding territory within the boundaries of the several States of the United States and citizens domiciled therein?

The power to extend or contract the territorial boundaries of the United States is vested in the political branch of our Government, to wit, the two Houses of Congress acting with the approval of the Executive. It is not to be exercised by the President, either as Chief Executive or as Commander in Chief of the military forces. The territorial boundaries of the United States do not advance with its successful armies nor retire before an invading foe. (Fleming et al. *v.* Page, 9 How. (U. S.), 603; United States *v.* Rice, 4 Wheat. (U. S.), 246.)

The United States derives the right to acquire territory from the fact that it is a nation; to speak more definitely, a sovereign nation. Such a nation has an inherent right to acquire territory, similar to the inherent right of a person to acquire property. (American Ins. Co. *v.* Canter, 1 Peters, 542; Mormon Church *v.* United States, 136 U. S., 1, 42.)

In fact, the territory, i. e., the stretch of country, when acquired by conquest, treaty, or discovery, is at first a possession appertaining or property belonging to the United States. The subsequent erection therein of a political entity or government, whether State or Territorial, and the bestowal of citizenship upon the inhabitants are acts of grace on the part of the new owner or sovereign. Such acts of grace

are sometimes stipulated for with the former sovereign, as was the case in the instances of Louisiana and Upper California, or omitted, as in the instance of the islands lately surrendered by Spain.

The opportunity to extend the boundaries of the United States may be afforded Congress by the successful conduct of a war by the Executive as the Commander in Chief of the Army and Navy, as in the war with Mexico; or by diplomatic negotiations, as in the instance of Louisiana; or by the proffer of the constituted authorities of the territory, as of Texas and the Hawaiian Islands; or by discovery, as of the Navassa Island; or by prior and long-continued occupation, as of Oregon.

The opportunity being afforded Congress, that body acts as its discretion determines. It may accept or reject as it sees fit. It was only after several years of deliberation that Congress completed the transfer of the Floridas and utterly rejected the proffer of Santo Domingo.

During the progress of the debate in the House on the Louisiana purchase treaty Mr. G. Griswold said:

If the right of extending our territory be given by the Constitution its exercise is vested in the legislative branches of the Government. (Annals of Congress, 1803-4, p. 433.)

John Randolph, of Virginia, said:

If the Government of the United States possess the constitutional power to acquire territory from foreign states, the Executive, as the organ by which we communicate with such states, must be the prime agent in negotiating such an acquisition. Conceding, then, that the power of confirming this act and *annexing to the United States the territory thus acquired ultimately rests with Congress* \* \* \*. (Annals of Congress, 1803-4, p. 436.)

Congress, having determined to accept the proffer of territory, may follow one of several procedures. In the instance of Texas the course pursued was to incorporate the existing State into the Union upon a footing of equality with the other States thereof. In the instance of the Hawaiian Islands the right was exercised by passing a joint resolution. In other instances the acquisition of territory was made by means of treaties duly negotiated and thereafter ratified by the Senate, approved by the Executive, an exchange of ratifications had and proclamation made, whereby the United States became bound and its national honor pledged to carry out the stipulations of the treaty. But in many respects a treaty is not self-operating.

It frequently happens that a treaty stipulates for that which can only be accomplished by Congressional enactment; in which case Congress, i. e., the Senate and House of Representatives, must exercise the powers of legislation in regard thereto before such stipulation is effective. The ratification of a treaty by the Senate *creates* a contract but does not *execute* it. When a treaty requires legislative enactments before it can become operative it will take effect as a national

compact on being proclaimed, but it can not become operative as to the particular engagements until the requisite legislation has taken place. (Foster et al. v. Neilson, 2 Peters, 253, 314-315; United States v. Arredondo, 6 Peters, 691, 734-735; Op. Atty. Gen., vol. 6, p. 750; also id., p. 296.)

The treaty with Great Britain, London, 1794, negotiated by Jay during Washington's Administration, was the first concluded with a foreign power by the United States under its present form of government. After its ratification this treaty was communicated to Congress for the information and guidance of that body in preparing the legislation necessary to render the treaty effective. The House of Representatives took the position that the assent of that body was necessary to the *validity* of a treaty. This was controverted by President Washington, and receded from by the House. (Annals, first session Fourth Congress, pp. 759-772.) Subsequently a resolution was introduced in the House that provision for rendering the treaty effective should be made by law duly enacted. This gave rise to an animated debate, but the resolution passed by a vote of 51 to 48. (Annals, first session Fourth Congress, p. 940.)

This question was also discussed in connection with the legislation for carrying into effect the treaty relating to the purchase of Louisiana. (Annals, first session Eighth Congress.)

In 1816 the Senate passed an act to carry into effect the commercial convention of 1815 with Great Britain. The act provided that so much of any existing act as might be contrary to the provisions of the convention should cease to be of force and effect. The House passed an act, in several sections, enacting *seriatim* the provisions of the treaty. The Senate claimed that the treaty was operative of itself, and therefore the act should be declaratory only. The House insisted that legislation was necessary to carry it into effect. Each body refused to recede. A conference committee agreed upon a bill which was then enacted. (3 U. S. Stat. L., 255.) The principle upon which an agreement was reached was reported to the House as follows:

Your committee understood the committee of the Senate to admit the principle contended for by the House that while some treaties might not require, others may require, legislative provision to carry them into effect; that the decision of the question how far such provision was necessary must be founded upon the peculiar character of the treaty itself. (Annals, first session Fourteenth Congress, p. 36.)

The subject was again before Congress when the bill making appropriations for the purchase of Alaska was under consideration (1, 2, 3, 4, and 5, Globe, second session Fortieth Congress), and was disposed of by the House accepting from a conference committee a preamble reciting that the stipulations of the treaty "that the United States shall accept of such session \* \* \* can not be carried into full force and effect except by legislation, to which the consent of both Houses of Congress is necessary." (15 U. S. Stat., 198.)

The report of the conference committee was adopted by the Senate and House of Representatives, and thereby Congress declares that the cession of territory to the United States must be effected by legislative enactment; that is, the assent of both Houses of Congress must be secured.

At the time the Constitution was adopted by the thirteen original States many of them claimed to own unoccupied territory, in some cases entirely detached from the State itself. These claims were in some instances conflicting. Several States claimed authority over the same area. The ownership of these western lands by individual States was distasteful to those States which did not share therein, mainly on the ground that the resources of the General Government, to which all contributed, were taxed for the protection and development of said regions, while the advantages inured to the benefit of but a few. On this ground several of the States refused to ratify the Constitution until this matter had been settled by the cession of these tracts to the General Government.

Moved by these arguments and by the consideration that the conflict of claims was pregnant with serious difficulties, Congress, by resolution of October 30, 1779, requested several of the States to forbear settling or issuing warrants or grants for said lands. This was transmitted to the different States. The several States claiming to own said lands responded to this request by transfers of the territory so claimed to the General Government. The first transfer was made by the State of New York on March 1, 1781, and the last by the State of Georgia April 24, 1802. A single instance will serve to show the course pursued. The general assembly of the State of North Carolina passed an act entitled "An act for the purpose of ceding to the United States of America certain western lands therein described."

Pursuant to the authority created by said act Samuel Johnston and Benjamin Hawkins, at that time United States Senators from North Carolina, executed a deed of cession of said lands to the United States and presented the same to the Senate of the United States. Thereupon the Senate and House of Representatives passed "An act to accept a cession of the claims of the State of North Carolina to a certain district of western territory." This act recited that "a deed of cession having been executed, and in the Senate offered for acceptance to the United States of the claims of the State of North Carolina, to a district of territory therein described, which deed is in the words following: \* \* \*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said deed be, and the same is hereby, accepted.*

Approved, April 2, 1790. (1 U. S. Stat., chap. 6, pp. 106, 109.)

It would seem that if Congressional legislation were necessary to complete the incorporation of territory into the United States upon

transfer from one of its component States, such Congressional action would be equally necessary where a transfer is from a foreign State.

That it is necessary to secure the assent of Congress in order that the territorial boundaries of the United States may be extended to include the islands ceded by the late treaty of peace with Spain (Paris, 1898), and that said treaty does not attempt to make such extension, is made plain by a comparison of said treaty with other treaties of cession to the United States and the procedure followed in regard thereto.

The treaty for the cession of Louisiana contained the following stipulations (8 U. S. Stat., 200-202):

The First Consul of the French Republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances. \* \* \*

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess.

(Articles 1 and 3, Treaty with France, 1803.)

The treaty of amity, settlement, and limits between the United States and Spain (1819), whereby was confirmed the title of the United States to the expanse of country known as East and West Florida, contains the following stipulations (8 U. S. Stat., pp. 254 and 256):

Art. 2. His Catholic Majesty cedes to the United States, *in full property* and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, known by the name of East and West Florida. \* \* \*

Art. 6. The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty *shall be incorporated in the Union of the United States*, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.

In the treaty of 1848, whereby Mexico relinquished the expanse of country known as Upper California and New Mexico, resort was had to the simple plan of *designating the northern boundary of the Mexican Republic*. The reason for this was that the United States took the position that, having taken and occupied the capital of the Mexican Republic, its title was perfected by complete conquest, not only of Upper California and New Mexico, but of the entire Republic, and the question to be determined was how much should be restored by the United States, not how much should be ceded by Mexico. Being vanquished, Mexico was obliged to assent to the proposition, and hence the adoption of the plan followed. The treaty contained the following stipulation (9 U. S. Stat., 930):

Art. 9. The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the

preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution.

The treaty with Mexico (1853), whereby the United States acquired the territory known as the "Gadsden Purchase," was, primarily, a stipulation as to boundary. Article 1 provided as follows (10 U. S. Stat., 1032):

The Mexican Republic agrees to designate the following as her true limits with the United States for the future:

Then follows an exact description of the location of the boundary line and how the same shall be surveyed and marked. Said article continues:

The dividing line thus established shall, in all time, be faithfully respected by the two Governments, without any variation therein, unless of the express and free consent of the two, given in conformity to the principles of the law of nations and in accordance with the constitution of each country, respectively.

The treaty with Russia (1867), whereby the United States acquired Alaska, contains the following stipulation (15 U. S. Stat., 539, 541, 542):

ARTICLE 1. His Majesty the Emperor of all the Russias agrees to cede to the United States \* \* \* all the *territory and dominion* now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: \* \* \*

ARR. 2. In the cession of *territory and dominion* made by the preceding article are included the rights of property of all public lots, \* \* \* which are not private individual property.

ARR. 3. The inhabitants of the ceded territory \* \* \* shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. \* \* \*

What was accomplished by article 1 of the treaty ceding Alaska, upon the treaty being ratified and exchanged, is stated by Dawson, J., as follows (29 Fed. Rep., 205):

Upon the ratification by the President of the United States, by and with the advice and consent of the Senate, on the one part, and on the other by His Majesty the Emperor of all the Russias, and an exchange of those ratifications \* \* \* *the title of the soil* in Alaska vested in the United States. (United States v. Nelson, 29 Fed. Rep., 202, 205.)

The expression "the title of the soil" as here used means the right of the sovereign or of *jus publicum*, not the right of a proprietor or of *jus privatum*.

The extension of the boundaries of the United States to include the Hawaiian Islands was accomplished by diplomatic negotiations, consummated by the passage, by the Senate and House of Representatives, and approval by the President, of a joint resolution reciting (30 U. S. Stat., 750)—

That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, *annexed as a part of the territory of the United States* and are subject to the sovereign dominion thereof.



It would be a work of supererogation to follow in detail the numerous acts of Congress whereby the various provisions of these several treaties were carried into execution and the boundaries of the United States extended to include the territory to which the treaties related. In each instance, however, it was accomplished by something more than entering into a treaty, although the manifest purpose and intent of the acquisition were to include such territory within our boundaries and such action was plainly contemplated in the treaties.

The stipulations of the treaty with France (Louisiana purchase, 1803) were made effective in and upon the United States by two acts of Congress. One was "An act to enable the President of the United States to take possession of the territories ceded by France to the United States by the treaty concluded at Paris on the 30th day of April last; and for the temporary government thereof," approved October 31, 1803. (2 U. S. Stats., 245.)

The other was "An act authorizing the creation of a stock, to the amount of \$11,250,000, for the purpose of *carrying into effect* the convention of the 30th of April, 1803, between the United States of America and the French Republic. \* \* \*," approved November 10, 1803. (2 U. S. Stats., 245.)

The act of October 31, 1803, was as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be, and he is hereby, authorized to take possession of and occupy the territory ceded by France to the United States by the treaty concluded at Paris on the thirtieth day of April last between the two nations; and that he may for that purpose, and in order to maintain in the said territories the authority of the United States, employ any part of the Army and Navy of the United States, and of the force authorized by an act passed the third day of March last, intituled "An act directing a detachment from the militia of the United States, and for erecting certain arsenals," which he may deem necessary; and so much of the sum appropriated for the purpose of carrying this act into effect to be applied under the direction of the President of the United States.

SEC. 2. *And be it further enacted,* That until the expiration of the present session of Congress, unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion.

Although Congress had thus legislated directly for Louisiana and the inhabitants of that country, President Jefferson did not consider the territory bound and benefited by the Constitution, nor the inhabitants entitled to the rights, privileges, and immunities guaranteed by the Constitution to the inhabitants of the United States. Upon the passage of the act of October 31, 1803, Jefferson sent commissioners to New Orleans to secure the transfer of possession. He also authorized one of the commissioners, Governor Claiborne, to exercise the powers theretofore possessed by the Spanish governor-general and the Spanish intendant of the territory. Under the Spanish régime the governor-general of the territory had almost royal authority. He

promulgated ordinances which had the force of statutes, appointed and removed at pleasure commandants over local subdivisions of territory, and presided over the highest court. The intendant, however, was a counterpoise. He acted as a comptroller, and payments could be made by the public treasurer only on his warrant. He was also judge of the courts of admiralty and exchequer. (See Pub. Doc., 8th Cong., Abstract of Documents in the offices of the Department of State and of the Treasury, Nov., 1803, pp. 33-41.)

A code of laws, many of which were repugnant to the Constitution of the United States and the institutions of our Government, was left to be administered or superseded and replaced by others at the will of one man, an agent of the Executive. There was a religious establishment. Two canons and twenty-five curates received salaries from the public treasury. (Pub. Doc., 8th Cong., Appendix 38.) All travelers, previous to circulating any news of importance, were bound to relate it to the syndic of the district, who was authorized to forbid its further circulation if he thought such prohibition would be for the public good. (Ibid., Appendix 71.) A son whose father was living could not sue without his consent, nor persons belonging to a religious order without that of their superior. (Ibid., Appendix 28.) A married woman convicted of adultery and her paramour were to be delivered up to the will of the husband, with the reserve, however, that if he killed one he must kill both. (Ibid., Appendix 46.) He who reviled the Saviour or the Virgin Mary was to be punished by having his tongue cut out and his property confiscated. (Ibid., Appendix 45.)

The treaty with Spain (1819) confirming the claims of the United States to East and West Florida was ratified by the Senate February 19, 1821, and thereafter Congress passed "An act for carrying into execution the treaty between the United States and Spain," etc., approved March 3, 1821 (3 U. S. Stat., 637). The territory so acquired was also the subject of much other legislation and other official action by the political powers of our Government treating it as being within the boundaries of the United States, such as creating therein the State of Alabama by an act passed March 2, 1819, nearly two years prior to the ratification of the treaty. Indeed, the United States has never conceded that it derived *title* to the Floridas from Spain. "All that part of Alabama which lies between the thirty-first and thirty-fifth degrees of north latitude was ceded by the State of Georgia to the United States by deed bearing date the 24th day of April, 1802," and the remainder was acquired by the Louisiana purchase. (Pollard's Lessee v. Hagan et al., 3 How., 212.)

The provisions of the treaty with Mexico (1848) relating to the northern boundary of the Mexican Republic were made effective as to the United States by legislation making appropriations—

For expenses in running and marking the boundary line between the United States and Mexico, marking the examinations contemplated by the sixth article of the treaty of Guadalupe Hidalgo. \* \* \* (9 U. S. Stat. L., pp. 301, 541, 614. Id., 320, sec. 3; 10 U. S. Stat. L., pp. 17, 94, 149.)

The purpose of the treaty between the United States and Spain (1898), as stated therein, was "to end the state of war now existing between the two countries." Being the victor, the United States dictated the terms and conditions upon which the war would end. The situation was in many respects the same as in the instance of the war with Mexico. The United States had captured and occupied the provincial capitals of Porto Rico, the Philippines, and the island of Guam, and the Spanish forces therein had surrendered to the force of American arms, and these provinces were subject to military occupation by the American forces. This was a sufficient basis of good title for the United States. So long as the United States continued to hold and occupy said islands neutral nations must recognize the United States as possessed of sovereignty therein. As was said by the United States Supreme Court with regard to territory subjected to military occupation during the war with Mexico:

It is true that when Tampico had been captured and the State of Tamaulipas subjugated other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such; for, by the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. \* \* \* As regarded by all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our *established boundaries*; but yet it was not a part of the Union, for every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws; and the relation in which the port of Tampico stood to the United States while it was occupied by our arms did not depend upon the law of nations, but upon our own Constitution and acts of Congress. (*Fleming v. Page*, 9 How., 603, 615.)

Such was the situation as to Porto Rico, the Philippines, and Guam when the Peace Commission assembled in 1898. One requirement made by the American commission was that Spain should assume toward the islands mentioned the same position as was occupied by the other nations of the earth, which is that the territory belongs to the United States, "but yet it was not part of this Union," or "included in our established boundaries," since these were matters which depend upon "our Constitution and the acts of Congress."

At the time of the peace conference at Paris in 1898 all the rights of Spain in the islands mentioned had not been obliterated. The sovereignty of Spain therein had been displaced and suspended, but not destroyed. Theoretically Spain retained the right of sovereignty, but the United States was in possession and exercising actual sovereignty. The rights of the United States were those of a belligerent and arose from possession and were dependent upon the ability to maintain that possession. Under the doctrine of postliminy the sovereignty and rights of Spain would become superior to those of the United States, if by any means Spain again came into possession of one or all of said islands. The American commission therefore required, as a condition precedent to a peace, that Spain surrender this right of repossession.

As regarded Cuba the situation was and remains different. The military forces of the United States had not captured Havana, the capital of the Spanish colony of Cuba, and only a relatively small portion of that island was subject to military occupation by our forces. In addition, the United States before invading Cuba had disclaimed any intention of acquiring sovereign rights in said island. Therefore the occupation of Cuba in whole or in part by the military forces of the United States, while it imposed duties, did not confer rights upon our Government. It follows that, at the time of the peace conference in 1898, the *title* of Spain to Cuba had not been divested by our military occupation. It was therefore necessary to require Spain to relinquish *title* in Cuba. This was done by the following provision in the treaty:

ART. 1. Spain relinquishes all claim of sovereignty over and *title* to Cuba.

But in the provisions of the treaty regarding the islands in which the United States had secured and was asserting rights of its own the language is different and the reference to *title* is omitted. To quote the exact words of the treaty:

ART. 2. Spain cedes to the United States the island of Puerto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam, in the Marianas or Ladrões.

ART. 3. Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within the following line:

The cession provided for by these articles is referred to five times in subsequent articles of the treaty, as follows:

ART. 9. \* \* \* the territory over which Spain by the present treaty relinquishes or cedes her sovereignty. \* \* \*

ART. 10. The inhabitants over which Spain relinquishes or cedes her sovereignty shall be, etc.

ART. 11. The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be, etc.

ART. 12. Judicial proceedings pending \* \* \* in the territories over which Spain relinquishes or cedes her sovereignty shall be, etc.

ART. 14. Spain will have the power to establish consular officers in the ports and places of the territories the sovereignty over which has been either relinquished or ceded by the present treaty.

It therefore seems that the word "cede," as used in this treaty, is to be given the meaning ascribed to it by ordinary usage, to wit, "To yield or surrender; to give up; to resign." (Webster's Dictionary.)

Consideration must also be given to the fact that nowhere in this treaty is mention or reference made of the territorial boundaries of the United States, either present or prospective; and to make "assurance doubly sure," the treaty provides:

ART. 9. \* \* \* The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

It results from the foregoing that when this treaty was ratified by the Senate and approved by the Executive, these two agencies of our

Government assented to the war ceasing and peace being established upon the condition (among others) that Spain assents to the rights secured by the United States by virtue of military occupation and abandons its right to regain the territory so occupied. In so doing, neither the Senate nor the Executive attempted to extend the territorial boundaries of the United States, nor to assent to such extension, for the proposition was in no wise involved. So that if the Senate or the Executive, acting alone or in conjunction, and without the concurrence of the House of Representatives, could extend or contract the territorial boundaries of the United States, it is sufficient to say that in this instance they have not attempted to exercise such power. The Senate placed itself on record by passing the following resolution:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the citizens of the United States and the inhabitants of said islands.*

As to the effect of action by the political branch of our Government regarding territory, the Supreme Court of the United States say (Marshall, Chief Justice):

If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession and which it claims under a treaty; *if the legislature has acted on the construction thus asserted*, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of a nation is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect *the pronounced will of the legislature*. (Foster et al. v. Neilson, 2 Peters, 253, 309.)

In a later case the court again assert this doctrine, and with reference to the announcement thereof in Foster v. Neilson say:

This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty to lead, but to follow the other departments of the Government; that when individual rights depended on national boundaries \* \* \* its duty commonly is to decide upon individual rights according to those principles which the *political departments of the nation have established*. \* \* \* We think, then, however individual judges might construe the treaty of San. Ildefonso, it is the province of the court to conform its decisions to the *will of the legislature, if that will has been clearly expressed*. (United States v. Arredondo et al., 6 Peters, 691, 711; Garcia v. Lee, 12 Pet., 511, 520.)

The effect of the treaty and the action thereon by the Senate and the Executive was to end the war. But the condition of the territory subject to military occupation as a result of that war was not changed by said treaty, except that it ceased to be a theater of actual war and the title of the United States was made incontestable.

Up to the present time the only powers of the United States which have been exercised in relation to these islands are the war powers. The confirmation of the treaty of peace was but the consummation of a war. But the military arm of our Government is without authority to extend the boundaries of the United States. In regard thereto the Supreme Court of the United States say:

A war, therefore, declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander in chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. *But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.* (Fleming et al. v. Page, 9 How., 614, 615.)

The military arm of our Government deals with our enemies' territory as "property." Such territory is lawful prize of war and is seized and held, as the Supreme Court say, "in order to indemnify its citizens for the injuries they have suffered or to reimburse the Government for the expenses of the war."

This is what has been done in the territory acquired by the United States in the late war with Spain. The President, having waged a war declared to exist by the Congress and having conquered a peace, presents to Congress the territory of said islands as so much property, seized as a spoil of war and to be dealt with by the sovereign people of the United States as shall be determined by that sovereign's will.

In *United States v. Reynes* the court say (9 How., 153, 154):

The legislative and executive departments of the Government have determined that the entire territory was so ceded. This court have solemnly and repeatedly declared that this was a matter peculiarly belonging to the cognizance of those departments. (*United States v. Reynes*, 9 How., 127, 153-154.)

In *Fleming et al. v. Page* the court further say (9 How., 616):

But the boundaries of the United States as they existed when war was declared against Mexico were not extended by the conquest; nor could they be regulated by the varying incidents of war and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, *as previously established by the political authorities of the Government, was still foreign.*

Attention is directed to the fact that the legislative department of the United States Government has not taken action of any kind whatever in regard to the territory of the islands ceded by Spain. The

Senate has advised the President to ratify the treaty of peace and terminate the war upon the terms set forth in the treaty. Being so advised, the President ratified the treaty. (30 U. S. Stats., 1754.)

Since the ratification the President and all the subordinate departments of the executive branch of our Government have treated said territory as being outside of the territorial boundaries of the United States.

Although these islands were outside the boundaries of the United States, they were territory appertaining to the United States, to which the sovereign people of the United States had acquired sovereign title, and in which said sovereign had secured many proprietary rights to property. It was therefore the duty of the President to use the means at his disposal to maintain the one and preserve the other. This duty is equally imperative should the emergency arise upon the high seas, or in territory recognized to be within the jurisdiction of another sovereignty. Therefore the discharge of such duty can not be interpreted as an assent to the extension of the territorial boundaries.

Apparently the position of the President is that the initial step in making known the will of the sovereign in regard to the extension of our boundaries to include this territory is to be taken by the legislative department, and the assent of the executive department to be evidenced by the approval of the acts of the legislative department by the President. This course is in harmony with the theory and established practices of our Government.

In the special message to Congress transmitting the Louisiana purchase treaty President Jefferson said:

With the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; *for its incorporation into our Union*; for rendering the change of government a blessing to our newly adopted brethren; for securing to them the rights of conscience and property, \* \* \* and establishing friendly relations with them. (Messages of the Presidents, Richardson's Comp., Vol. I, p. 358.)

In that message Jefferson also said:

\* \* \* The property and sovereignty of all Louisiana \* \* \* have on certain conditions been transferred to the United States by instruments bearing date the 30th of April last. When these shall have received the constitutional sanction of the Senate they will without delay be communicated to the *Representatives also* for the exercise of *their* functions as to those conditions which are within the powers vested by the Constitution in Congress. (Ibid.)

After the Louisiana purchase treaty had been ratified by the Senate and ratifications exchanged, Jefferson again sent the treaty to Congress, accompanied by a message wherein he said:

These conventions \* \* \* are communicated to you for consideration *in your legislative capacity*. You will observe that some important conditions can not be carried into execution but with the aid of the Legislature. (Richardson's Comp., Vol. I, p. 362.)

See also debate in House of Representatives, beginning October 24, 1803, on the motion for carrying into effect the Louisiana purchase treaty. (Annals of Congress, 1803-4, p. 471.)

These islands have been affected by the *war* rather than the *treaty*. War wrought the changes, the treaty only confirms them.

The result of the war with Spain upon these islands was to destroy the jurisdiction of Spain therein and compel a withdrawal of Spanish sovereignty therefrom, leaving the islands in the possession of the United States. Thereupon they became land appertaining to the United States and in the possession of the United States, but not within the territorial boundaries of the United States.

There may be some question as to whether or not all the country within the territorial boundaries of the United States is bound and privileged by the provisions of the Constitution, but there can be no question that territory without the boundaries of the United States is not bound and privileged by our Constitution.

The United States Supreme Court say:

The Constitution can have no operation in another country. (In re Ross, 140 U. S., 453, 464, citing; *Cook v. United States*, 138 U. S., 157, 181.)

This brings us to the question:

Has the Congress authority to legislate for territory appertaining to and in the possession of the United States, but outside of the territorial boundaries?

This exact question was presented to the Supreme Court of the United States in three cases decided in 1890—*Jones v. United States*, *Smith v. United States*, and *Key v. United States* (137 U. S., 202). The territory involved was the Navassa Island, in the Caribbean Sea. The island is a small one, and wittily designated by a recent magazine writer on this subject as “an abandoned manure heap.” But the cases presented to the Supreme Court involved the infliction of the death penalty on American citizens, than which no question the courts are called upon to decide is more solemn.

The court held:

The guano islands act of August 18, 1856, c. 164, reenacted in Revised Statutes, sections 5570-5578, is constitutional and valid.

The provisions of that law directly involved were as follows:

SEC. 5570. Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, *be considered as appertaining to the United States*.

SEC. 5576. All acts done and offenses or crimes committed on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel



belonging to the United States, and shall be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws, for the purpose aforesaid, are extended over such islands, rocks, or keys.

! The indictment charged that Henry Jones,

at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offenses, \* \* \* an island situated in the Caribbean Sea and named Navassa Island, \* \* \* and which was then and there recognized and considered by the United States as appertaining to the United States, and which was then and there in the possession of the United States, \* \* \*

murdered one Thomas N. Foster.

The defendant filed a general demurrer, which was overruled, and he then pleaded not guilty. Trial was had, and the jury returned a verdict of guilty. Thereupon the defendant moved in arrest of judgment—

Because the act of August 18, 1856, c. 164, now codified with amendments as title 72 of the Revised Statutes of the United States, is unconstitutional and void, and the court was without jurisdiction to try the defendant under the indictment found against him.

The motion was overruled and the defendant sentenced to death. In affirming this sentence the court say (137 U. S., 212):

By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. (Vattel, lib. I. c. 18; Wheaton on International Law, 8th ed., §§ 161, 165, 176, note 104; Halleck on International Law, c. 6, §§ 7, 15; 1 Phillimore on International Law, 3d ed., §§ 227, 229, 230, 232, 242; 1 Calvo, Droit International, 4th ed., §§ 266, 277, 300; Whiton *v.* Albany Ins. Co., 109 Mass., 24, 31.)

When Spain elected to go to war rather than withdraw from Cuba, she subjected the sovereignty and dominion of her entire realm to the hazard of that war, and by the laws of war and of nations she made it lawful for her adversary to invade any part of her domain and displace her sovereignty, exclude her jurisdiction, and destroy her dominion; in other words, effect a complete conquest. So much of her domain as became so situated was without the jurisdiction of Spain and within the possession of the United States. As to the United States, such territory was the same as land newly discovered and occupied by citizens of the United States, with this difference, the occupier was a military force of the United States sent there by the nation itself, instead of a private citizen and pioneer adventurer.

The sovereignty and jurisdiction of the United States have attached to the territory embraced in a number of islands, under the act of August 18, 1856, as will appear from the following correspondence on file in the Treasury Department:

TREASURY DEPARTMENT, FIRST COMPTROLLER'S OFFICE,  
Washington, D. C., September 16, 1893.

Hon. S. WIKE,

*Assistant Secretary of the Treasury.*

SIR: In compliance with the request contained in your letter of the 15th instant, I have the honor to transmit herewith a list of the guano islands bonded under the act of August 18, 1856, as appears from the bonds on file in this office up to the present date. You will observe that the list is the same as that transmitted with letter from this office, dated December 22, 1885, no additional bonds having been received since that date.

Respectfully, yours,

R. S. BOWLER, *Comptroller.*

*List of guano islands, appertaining to the United States, bonded under the act of August 18, 1856, as appears from bonds on file in the office of the First Comptroller of the Treasury, September 16, 1893.*

Number of bond.	Date of bond.	Name of island.	Latitude.			Longitude.		
			°	'	"	°	'	"
1	Oct. 28, 1856	Bakers, or New Nantucket.....	0	15	00 N	176	30	00 W
2	....do.....	Jarvis.....	0	21	00 S	159	52	00 W
3	Aug. 31, 1858	Navassa.....	18	10	00 N	75	00	00 W
4	Dec. 3, 1858	Howland, or Nowlands.....	0	52	00 N	176	52	00 W
5	Sept. 6, 1859	Johnsons Islands.....						
6	Dec. 27, 1859	Barren, or Starve.....	5	40	00 S	155	55	00 W
		Enderbury.....	3	08	00 S	171	08	00 W
		McKean.....	3	35	00 S	174	17	00 W
		Phoenix.....	3	47	00 S	170	55	00 W
7	Dec. 29, 1859	Christmas.....	1	58	00 N	157	10	00 W
8	....do.....	Maldens Islands.....	4	00	00 S	165	00	00 W
9	Feb. 8, 1860	America Islands.....	3	40	00 N	159	28	00 W
		Annes.....	9	49	00 S	151	15	00 W
		Barbers.....	8	54	00 N	178	00	00 W
		Baumans.....	11	48	00 S	154	10	00 W
		Birnie's.....	3	35	00 S	171	39	00 W
		Caroline.....	9	54	00 S	150	07	00 W
		Clarence.....	9	07	00 S	171	40	00 W
		Dangerous Islands.....	10	00	00 S	165	56	00 W
		Dangers Rock.....	6	30	00 N	162	23	00 W
		Dauids.....	0	10	00 N	170	10	00 W
		Duke of York.....	8	36	00 S	172	10	00 W
		Enderburys.....	3	08	00 S	174	14	00 W
		Farmers.....	3	00	00 S	170	50	00 W
		Favorite.....	2	50	00 S	176	40	00 W
		Flint.....	10	32	00 S	162	05	00 W
		Flints.....	11	26	00 S	151	48	00 W
		Frances.....	9	58	00 S	161	40	00 W
		Frienhaven.....	10	00	00 S	156	59	00 W
		Gardners.....	4	40	00 S	174	52	00 W
		Gallego.....	1	42	00 N	104	05	00 W
		Ganges.....	10	59	00 S	160	55	00 W
		Groninque.....	10	00	00 S	156	44	00 W
		Humphreys.....	10	40	00 S	160	52	00 W
		Kemns.....	4	41	00 S	173	44	00 W
		Liderons.....	11	05	00 S	161	50	00 W
		Low Islands.....	9	33	00 S	170	38	00 W
		Mackin.....	3	02	80 N	172	46	00 W
		Mary Letitias.....	4	40	00 S	173	20	00 W
		Marys.....	2	53	00 S	172	00	00 W
		Mathews.....	2	03	00 N	173	26	00 W
		Nassau.....	11	30	00 S	165	30	00 W
		Palmyros.....	5	48	00 N	162	20	00 W
		Penhuyms.....	8	55	00 S	158	07	00 W
		Pescado.....	10	38	00 S	159	20	00 W
		Phoenix.....	3	40	00 S	170	52	00 W
		Prospect.....	4	42	00 N	161	38	00 W
		Quiros.....	10	32	00 S	170	12	00 W
		Ricersons.....	10	10	00 S	160	53	00 W
		Rogeweins Islands.....	11	00	00 S	156	07	00 W

*List of guano islands, appertaining to the United States, bonded under the act of August 18, 1856, etc.—Continued.*

Number of bond.	Date of bond.	Name of island.	Latitude.			Longitude		
			S	°	"	S	°	"
9	Feb. 8, 1860	Samarang Islands.....	5	10	00 N	162	20	00 W
		Sarah Anne.....	4	00	00 N	154	22	00 W
		Sidneys Islands.....	4	20	00 S	171	00	00 W
		Starbuck or Hero.....	5	25	00 S	155	56	00 W
		Stavers.....	10	05	00 S	152	16	00 W
		Walkers.....	3	58	00 N	149	10	00 W
		Washington or Tahuga.....	4	40	00 N	163	07	00 W
10	Dec. 30, 1862	Great and Little Swan Islands in the Caribbean Sea.....						
11	Aug. 12, 1868	Islands in Caribbean Sea not named on bond.....						
12	Nov. 22, 1869	Pedro Keys, Quito Sereno, Petrel, Roncador.....						
13	Sept. 8, 1879	Serranilla Keys, viz: East Key, Middle Key, Beacon Key.....	15	20	00 N	79	40	00 W
		Moran Keys, viz: Northeast Key, Sand Keys, Savanna Key, Seal Key.....	17	26	00 N	77	55	00 W
		Arenas Key.....	22	07	10 N	91	24	30 W
14	Sept. 13, 1880	De Aves.....	15	40	00 N	63	37	00 W
		Serranilla Keys.....	15	20	00 N	79	40	00 W
		Western Triangles.....	20	54	00 N	92	13	00 W
15	Oct. 18, 1880	Island of Arenas.....	22	24	30 N	91	24	50 W

CIRCULAR.—GUANO ISLANDS NOT APPERTAINING TO UNITED STATES.

[1894.—Department No. 176.—Bureau of Navigation.]

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,

Washington, D. C., November 24, 1894.

To Collectors of Customs and others:

At the request of the Secretary of State, the following-named "guano islands," specified in lists issued by this Department of guano islands appertaining to the United States, will be considered as stricken from said list and no longer included among the guano islands bonded by the United States under the act of August 18, 1856, viz, Arenas, Perez, Pajoras, Chica, Arenas Key, Western triangles.

S. WIKE, Assistant Secretary.

The sovereignty of the United States is not confined within territorial boundaries. Broadly speaking, it is coextensive with the world. By virtue of its sovereignty the United States acquires the right to recognition as a member of the family of nations, with all the rights and privileges appertaining to such relationship. It may wage war in foreign territory, traverse the high seas, and protect its citizens and flag wherever found. It may also acquire rights outside of the boundaries of the territory belonging to it, both peaceably and forcibly, as, for instance, the right to move its troops through foreign territory, construct ship canals, control harbors, establish coaling stations, consulates, and other agencies of commerce. Take the instance of the acquisition of land in a foreign capital by the United States upon which to erect an embassy. Such land would belong to the United States, its sovereignty would attach thereto and its flag float thereover by sovereign right; but it would not follow that said land was territory bound and benefited by the provisions of our Constitution, and that a person setting foot on said premises would secure the right of

unrestricted locomotion throughout the United States, or that goods brought upon the premises were subject to the customs tariffs of the United States.

The *sovereignty* of the United States "follows the flag" wherever the flag is raised by the authority of that sovereignty, whether the raising is accomplished by a discoverer, an ambassador, or a military commander, but the territorial boundaries of the United States do not until appropriate action has been taken by Congress.

The usage of the world is that territory, title to which is acquired by conquest and the acquisition confirmed by treaty of peace, is to be dealt with by the new sovereign according to the terms of the treaty, or, in the absence of treaty stipulations, upon such terms as the new sovereign shall impose.

The new sovereign in the instance with which we have to deal is the sovereign people of the United States. That sovereign has conferred upon Congress the authority to impose the terms and prescribe the means of accomplishing the purposes of government in all places to which its sovereignty attaches, or subject to its jurisdiction, and as to all property to which it has rights. (Art. 4, sec. 3, Const.) In the exercise of this authority, Congress, with the approval of the Executive, may extend the boundaries of the United States to include this island territory.

If Congress should extend the boundaries of the United States to include these islands it may thereafter continue them in the condition of property by allowing them to remain unorganized territory, as was done with Oregon and other parts of the West for many years. Or Congress may create in said territory a political entity which we call a "State," and admit it into the Union of States, with the powers possessed by the other component States, as was done with California. Or Congress may erect in said territory the political entity known as a "Territory," and possessed of such powers as Congress sees fit to confer upon it, as has been done in many instances throughout our history.

The important matter to be now determined is, *shall the boundaries of the United States be extended to include any or all of the islands of Porto Rico, Philippine Archipelago, and Guam.*

The determination must be made by Congress and approved by the Executive.

This extension of boundaries may be accomplished directly by express legislation in regard thereto, as in the instances of Hawaii and Florida, or indirectly by legislation of such kind and character that the purpose to make such extension is established by necessary intentment, as in the instances of Louisiana, California, and Texas.

One of the first acts of the first session of the Congress of the United States imposed the penalty of death for robbery and kindred offenses

committed on the "high seas" or any river, haven, basin, or bay, out of the jurisdiction of any particular State." (Sec. 8, chap. 9, act approved April 30, 1790; 1 Stats., 113.)

The United States Supreme Court held this act to be constitutional, and applied to foreigners when the offense was committed on board a vessel of the United States, or to any person committing the offense on a vessel which had no national character. (United States *v.* Furlong, 5 Wheat., 184; United States *v.* Holmes, 5 Wheat., 412; United States *v.* Klintock, 5 Wheat., 144.)

In 1820 the Congress of the United States passed an act which provided that—

Every person who, being of the crew or ship's company of any foreign vessel engaged in the slave trade, \* \* \* lands from such vessel and, on any foreign shore, seizes any negro or mulatto with intent to make such negro or mulatto a slave, \* \* \* is a pirate, and shall suffer death. (See sec. 5376, Rev. Stats. U. S.)

This act was directed against the practice of seizing the inhabitants of Africa and converting them into slaves. It was an assertion of world-wide sovereignty, and illustrates the doctrine that the sovereignty of a nation terminates only where the prior rights of another recognized sovereignty begin, and may attach itself to any land or territory not within the jurisdiction of a recognized sovereignty.

It is only necessary to call attention to the legislation of Congress regarding the many persons and matters subject to the maritime and admiralty jurisdiction of the United States to establish that Congress has extraterritorial powers of legislation. *Extraterritorium* means beyond or outside of the territorial limits of a state (6 Binn., 353), and by extraterritorial powers of legislation is meant the authority to create legislation which will operate upon persons, rights, or laws beyond the limits of the state, but which are still amenable to its laws.

These powers are not confined to the seas. By treaties or other international agreements, upon principles of the comity of nations and the usages of the world, the sovereign people of the United States acquire many rights to trade in the territory and with the inhabitants of other nations. When acquired, these rights belong to the sovereignty of the United States, and are sovereign rights, the exercise of which may be and are regulated by Congressional legislation. The same is true of our relations with foreign governments as maintained and conducted by our representatives and instrumentalities in foreign lands. They remain within the jurisdiction and subject to the sovereignty of the United States, although without its territorial boundaries. The exact rule is that *wherever the sovereignty of the United States may be asserted, the Congress of the United States may prescribe the ways and means, the manner and methods by which such sovereignty is to be asserted.*

The determination of the question as to where the sovereignty and jurisdiction of the United States shall be asserted is to be made by the Congress and the Executive. It is a political question, and calls for the exercise of powers possessed by the political branch of the Government. In *United States v. The James G. Swan* the court say:

As our Government is constituted, the President and Congress are vested with all the responsibility and powers of the Government for the determination of questions as to the maintenance and extension of our national dominion. It is not the province of the courts to participate in the discussion or decision of these questions, for they are of a political nature, and not judicial. The Congress and the President having assumed jurisdiction and sovereignty, and having made declarations and assertions as to the extent of our national authority and dominion above indicated \* \* \* all the people and courts are bound by such governmental acts, declarations, and assertions \* \* \* and the responsibility of maintaining the national authority within the boundaries so fixed, and to the extent asserted by the executive and legislative authority against foreign governments, rests with the executive and legislative branches of the Government. (*United States v. The James G. Swan*, 50 Fed. Rep., 108, 111.)

With reference to the same question, the United States Supreme Court say (137 U. S., 212):

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which, by the legislative and executive departments of any government, conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances. (See authorities cited.)

Continuing the discussion, the court say (p. 214):

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of the foreign power, as appearing from the public acts of the legislature and the executive. (See authorities cited. *Jones v. United States*, 137 U. S., 202, 212, 214.)

The legislation enacted by Congress regarding consular courts (Title 47, p. 783, U. S. Rev. Stats.), conferring jurisdiction thereon and regulating procedure therein, is also an example of the exercise of its power of extraterritorial legislation by Congress. This legislation was sustained by the United States Supreme Court in a case wherein a man had been convicted and sentenced to death by the American consular tribunal in Japan. (In re Ross, 140 U. S., 453.) The case was as follows: John M. Ross, a seaman of the American ship *Bullion*, was charged with murder, committed on board said ship while in the harbor of Yokohama, Japan. He was placed on trial before the consul-general of the United States at Kanagawa, Japan, sitting as a court in that place, in pursuance and by authority of the statutes of the United States for that purpose made and provided. He was not indicted by a grand jury, but a complaint in writing was filed in said tribunal. The accused demanded a trial by jury, which was denied, and the court

proceeded to hear and determine the case without a jury, entered judgment of conviction, and sentenced the accused to be hanged. The President of the United States commuted this sentence to life imprisonment in the penitentiary at Albany, N. Y.

After being incarcerated in said prison for nearly ten years, Ross applied to the circuit court of the United States for the northern district of New York for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence, and imprisonment were unlawful, and stating the causes thereof and attendant circumstances. The writ was issued directed to the superintendent of the penitentiary, who made return that he held the petitioner under the warrant of the President, a copy of which was annexed. The circuit court, after full consideration of the subject, entered an order denying the motion for discharge and remanding the prisoner to the penitentiary. From that order an appeal was taken to the United States Supreme Court. Therein it was contended that the United States consular court by which he was tried was without jurisdiction of his person, because he was not a citizen of the United States and was a subject of Great Britain; that said consular court was without jurisdiction of the offense charged because it was committed aboard a vessel of the United States on the high seas, and by the laws of the United States such offenses so committed were to be tried in the United States before its domestic tribunals; that if it were held that the offense was committed in Japan and not upon the high seas, then, the prisoner insisted, that—

The statutes creating the consular courts, as well as the treaties under which they are instituted and from which they derive such authority and jurisdiction as they possess, expressly subject that jurisdiction to the laws of the United States.

The claim that the Constitution has no extraterritorial force is disproved by the existence and operation of the consular court itself.

The refusal to allow the accused a trial by jury was a fatal defect in the jurisdiction exercised by the court, and renders its judgment absolutely void. (See 140 U. S., 460.)

The holding of the court, as stated in the syllabus, is as follows:

By the Constitution of the United States a government is ordained and established "for the United States of America," and not for countries outside of their limits; and that Constitution can have no operation in another country.

The laws passed by Congress to carry into effect the provisions of the treaties granting extraterritorial rights in Japan, China, etc. (Rev. Stats., §§ 4083-4096), do no violation to the provisions of the Constitution of the United States, although they do not require an indictment by a grand jury to be found before the accused can be called upon to answer for the crime of murder committed in those countries or to secure to him a jury on his trial.

Regarding the authority of Congress to legislate for territory without the boundaries of the United States, the court in the body of the opinion say:

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out,

contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial secured by the Constitution to citizens of the United States at home should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offense of that grade committed in those countries, or to secure a jury on the trial of the offense. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad.

The Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, can not invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable, from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries if commercial intercourse was to be had with their people, never could have supposed that all the guaranties in the administration of the law upon criminals at home were to be transferred to such consular establishments and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guaranties of the Constitution against unjust accusation and an impartial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. (In *re* Ross, 140 U. S., 463, 465.)

The right of Congress to confer jurisdiction in civil matters upon consular courts was declared to exist by the United States Supreme Court in *Dainese v. Hale*, 91 U. S., 13.

The constitutionality of Congressional legislation regarding consular courts is discussed and sustained in the following cases: *Mahoney v. United States* (10 Wall., 66, 67); *In re Joseph Stupp* (11 Blatchford, 124); *United States v. Craig* (28 Fed. Rep., 801), (opinion by Justice Brown); *United States v. Smiley* (6 Saw., 645), (opinion by Justice



Fields); *Steamer Spark v. Lee Choi Chum* (1 Saw., 713); *Tazaymon v. Twombly* (5 Saw., p. 79); *The Pingon* (7 Saw., 483); *The Pingon* (11 Fed. Rep., 607).

Pursuant to the provisions of Title 47, sections 4083 to 4130, the United States is maintaining consular courts in the following countries: China, Korea, Maskat, Morocco, Persia, Samoa, Siam, Tonga, Turkey, and Zanzibar.

This Government also maintained consular courts in Japan up to July 17, 1899, when the new treaty with Japan, which abolished these courts, went into effect.

The right of legislation in regard to consular courts in territory within the jurisdiction of a recognized sovereignty with which the United States maintains foreign relations is to be exercised in accordance with existing treaty stipulations in regard thereto. The right is not created by the treaty, but is simply regulated thereby. Consular courts are instituted and maintained in countries subject to the dominion of semicivilized or barbarous people whose chieftains we do not recognize as possessing sovereign powers and with whose government we do not make treaties nor maintain foreign relations.

Section 4088, Revised Statutes of the United States, is as follows:

The consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people or recognized by any treaty with the United States are authorized to try, hear, and determine all cases in regard to civil rights, whether of person or property, where the real debt or damages do not exceed the sum of \$1,000, exclusive of costs, and, upon full hearing of the allegations and evidence of both parties, to give judgment according to the laws of the United States and according to the equity and right of the matter, in the same manner as justices of the peace are now authorized and empowered where the United States have exclusive jurisdiction. They are also invested with the powers conferred by the provisions of sections 4086 and 4087 for trial of offenses or misdemeanors.

Regarding this section Attorney-General Garland said:

The jurisdiction thus conferred is based upon the well-received doctrine of international law that consuls in barbarous or semibarbarous States are to be regarded as investing with extraterritoriality the place where their flag is planted, and if justice is to be administered at all, so far as concerns civilized foreigners visiting such States, it must be by tribunals such as are named in section 4088, Revised Statutes. (18 A. G. Op., 219, 220.)

The United States has acquired and still retains certain rights in the Samoan Islands. Wharton's International Digest, Vol. I, sec. 63, contains the following:

In March, 1872, certain commercial arrangements were made by Manga, chief of Tutuila, and commander Meade, of the U. S. S. *Narragansett*, for the use of the port of Pango-Pango. According to a summary in the *Nineteenth Century* for February, 1886, "It was arranged that Pango-Pango should be given up to the American Government, on condition that a friendly alliance existed between that island and the United States. Pango-Pango Harbor has thus passed forever from the hands of the British."

The rights so acquired were subsequently confirmed by treaty between the United States and the Government of the Samoan Islands (January 17, 1878). Article II of said treaty is as follows:

Naval vessels of the United States shall have the privilege of entering and using the port of Pango-Pango, and establishing therein and on the shores thereof a station for coal and other naval supplies for their naval and commercial marine, and the Samoan Government will hereafter neither exercise nor authorize any jurisdiction within said port adverse to such rights of the United States or restrictive thereof.

Although Congress has legislated as to how and by what means the rights secured by the United States in the Samoan Islands are to be exercised, it has never been claimed that the boundaries of the United States had been extended to include any of the territory constituting the Samoan Islands. The reason for this is that neither by direct legislation or necessary intendment has Congress ever manifested its assent to such extension.

The right of Congress to create extraterritorial legislation is based upon the fact that a citizen of the United States passing without our territorial boundaries is not thereby divested of the allegiance he owes this Government nor the privileges and obligations arising therefrom. Wherever he goes he is entitled to call for and receive the protection of the sovereignty of the United States. This protection is to be afforded to such extent and in such manner and form as shall seem adequate and proper to that sovereignty. Under our form of government the authority of declaring the will of the sovereign—i. e., the people of the United States—is vested in Congress. This privilege of protection by his sovereign enjoyed by a citizen carries with it an obligation on his part to respect the will of his sovereign; that is, to obey its laws. If he refuses to respect this obligation, the sovereign may reach out to punish him as it is bound to do to protect him. The will of the sovereign of the United States in regard thereto is made known by Congress. Here, again, Congress acts in harmony with treaty stipulations, if any exist, but the right to enforce sovereign authority over its citizens is not created by treaties.

This brings the discussion to the question, Are the inhabitants of said islands "citizens" of the United States? If by "citizen" is meant "a member of the civil state, entitled to all its privileges," the question must be answered in the negative, for even in the treaty it is provided that "the civil rights and political status \* \* \* shall be determined by the Congress" (art. 9), and Congress has not yet made such determination. Nor do they fulfill the requirements of the fourteenth amendment to the Constitution, for while they are subject to the jurisdiction of the United States they are not "persons born or naturalized in the United States."

If by "citizen" is meant one who owes allegiance to our Government in return for the protection which the Government affords him, then the inhabitants are citizens of the United States.

That the inhabitants of these islands are entitled to call upon the United States to protect them in their rights of property and person, preserve the public peace, maintain law and order, and prevent encroachments upon the territory by foreign nations can not be denied. Correlatively, the inhabitants owe allegiance to the sovereignty and obedience to the laws whereby the sovereignty undertakes to discharge the obligation.

The sovereignty and jurisdiction of the United States having attached to said islands, persons continuing therein are subject to the laws put in force therein by the United States, without regard to their citizenship, with such exceptions as are in force in other territory subject to the jurisdiction of the United States.

Regarding the citizens of the United States who were domiciled in the town of Castine while subject to military occupation by the forces of Great Britain during the war of 1812, the United States Supreme Court say (*United States v. Rice*, 4 Wheat., 247, 254):

By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience.

Certainly the sovereignty of the United States may enforce against the subjects of another sovereignty a rule it is willing to apply to its own citizens.

Regarding the powers of Congress over Alaska, Dawson, J., said (29 Fed. Rep., 205):

Possessing the power to erect a Territorial government for Alaska, they could confer upon it such powers, judicial and executive, as they deem most suitable to the necessities of the inhabitants. *It was unquestionably within the constitutional power of Congress to withhold from the inhabitants of Alaska the power to legislate and make laws.* In the absence, then, of any *lawmaking power in the territory*, to what source must the people look for the laws by which they are to be governed? This question can admit of but one answer. Congress is the only lawmaking power for Alaska. (*United States v. Nelson*, 29 Fed. Rep., 202, 205-206.)

In speaking of the powers of Congress in legislating for territory subject to the jurisdiction of the United States, but outside of the jurisdiction of any one of the States of the Union, the circuit court of appeals, ninth circuit, say:

It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. (*Endleman v. United States*, 86 Fed. Rep., 456, 459.)

In *Snow v. United States* (18 Wall., 319) the court say:

The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories they are mere dependencies of the United States. *Their people do not constitute a sovereign power.* All political authority exercised therein is derived from the General Government.

From the foregoing it seems manifest that the legislative powers of Congress are coextensive with the authority of the United States, and that in legislating for territory and individuals without the boundaries of the United States Congress need not conform to the constitutional requirements regarding territory within the boundaries of the United States and citizens domiciled therein.

With the light of these interpretations afforded by judicial decision and Congressional action, let us examine the Constitution itself:

Article I, section 8, of the Constitution confers upon Congress the power—

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

It can not be seriously contended that the high seas are within the territorial boundaries of the United States.

The people of the United States, in adopting this provision, recognized the fact that the sovereignty of the United States was world-wide, and that such sovereignty could attach itself, and secure jurisdiction to exercise authority at any point without the jurisdiction of another recognized sovereignty.

The provision regarding "offenses against the law of nations" is a similar recognition. By the law of nations, when an invading army has driven out the opposing sovereign and overthrown the existing government, the invader is bound to replace said government by one of his own. The Brussels project of an international declaration concerning the laws and customs of war provides as follows:

ART. 2. The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to reestablish and secure, as far as possible, public safety and social order.

See also section 43, Recommendations of Institute of International Law, Oxford Session, 1880; section 1, Lieber's Instructions for the Government of Armies of the United States in the Field. (G. O., 100, A. G. O., 1863.)

In ancient times governments of this character were administered according to the accepted doctrine: "The will of the conqueror is the law of the conquered." This doctrine is still recognized as a law of nations, but has been so modified by modern usage as to deprive it of its terrors. Without stopping to discuss these modifications, attention is directed to the fact that in the instance with which we have to deal the "conqueror" is the sovereign people of the United States.

Under the distribution of powers made by that sovereign its "will" is to be made known by its Congress:

Inasmuch as the people of the United States, i. e., the sovereign of the United States, is required to establish government in such territory, any interference or obstruction by the inhabitants seeking to prevent the discharge of this obligation would be an offense against the law of nations, unless persons taking such action are "in arms" by authority of and in defense of the prior sovereignty.

Article I, section 8, of the Constitution also confers upon Congress the authority—

To declare war, grant letters of marque and reprisal and make rules concerning captures on land and water.

Until Congress shall change their character and condition the islands under consideration will remain "captures," the possession of which by the United States has been confirmed by the treaty of peace. "Captures" only in the sense that they are to be legislated for by the Congress of the United States, whose enactments have been of such character that the country and people heretofore subject thereto are the envied of enlightened humanity less favorably circumstanced.

Article IV, section 3, of the Constitution provides that—

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

This clause was drafted by Gouverneur Morris. Fifteen years after the adoption of the Constitution, in answer to a question as to the precise meaning of the clause, he wrote:

I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article I went as far as circumstances would permit to establish the exclusion. (3 Morr. Wr., p. 192.)

Regarding this clause in the Constitution the Supreme Court say (14 Peters, 537):

The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the Territorial governments rest. (*United States v. Gratiot et al.*, 14 Pet., 524, 537.)

The decisions of the courts uniformly sustain the doctrine that by this provision of the Constitution Congress is given the power to govern those portions of the public domain lying outside of the boundaries of the several States of the Union, in the manner and by the means which to Congress seem best adapted to existing conditions, ranging from a joint protectorate, such as is exercised over Samoa, to a Territorial government of well-nigh sovereign power, such as exists in Oklahoma.

Returning to Article I. section 8, we find that Congress is thereby empowered—

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

The Constitution specifically vests in the Government of the United States the authority to engage in war. If it is conceded that when engaged in war the United States is bound by the law of nations regulating civilized warfare, it follows that its first and paramount duty is to compel a peace, and for this purpose it may wrest from its adversary all and every means of continuing the warfare. This includes not only guns and ships, but public revenues and other property, the allegiance and support of subjects, territory, dominion, and sovereignty. Having wrested any or all these from its adversary and reduced them to its own possession, the laws of nations, the interests of civilization, and the dictates of humanity all impose duties and obligations in regard thereto upon the Government of the United States. By what means the duties and obligations so arising from the acquisition of the islands under consideration are to be discharged, and the general principles governing the use of said means, has already been discussed herein.

That the sovereignty of the United States would attach to territory without its territorial boundaries, that jurisdiction over such territory would be attained thereby, and that Congress would be required to legislate therefor, is plainly recognized and asserted in the thirteenth amendment to the Constitution, as follows:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

What is meant by "any place subject to their jurisdiction," if not such territory as that with which we have now to deal? If said language was intended to designate those portions of our country in which Territorial governments were established, it follows that the other sections of the Constitution, from which said clause is omitted, are not in force in the "Territories," and Congress may extend the boundaries of the United States to include said islands, erect Territorial governments therein, and legislate therefor without such legislation being subject to the provisions of the Constitution or the territory or the inhabitants being entitled to the benefits, privileges, and immunities created by the Constitution.

Regarding the exercise of these great powers, the United States Supreme Court say:

Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. (*United States v. Fisher*, 2 Cranch, 358.)

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. (*McCulloch v. Maryland*, 4 Wheat., 316; *Prigg v. Pennsylvania*, 16 Pet., 539.)

If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance. (*McCulloch v. Maryland*, 4 Wheat., 316.)

If these islands and their inhabitants are without the aegis of the Constitution, what then is their protection from an oppressive government and unjust laws? The answer is plain. Such protection is found in the character and enlightenment of the new sovereign within whose jurisdiction they now are, to wit, the sovereign people of the United States. They are a charge upon the conscience of that sovereign, and the "inalienable rights" of a people are safe in that custody even when not guaranteed by the letter of the Constitution, for they are protected by laws higher than the Constitution, being the laws of American civilization, the moral sentiment of the nation pervading all our institutions and from which even the Constitution derives its force.

In *Johnson v. McIntosh* (8 Wheat., 589) the United States Supreme Court, speaking by Marshall, Ch. J., say:

Humanity, acting on public opinion, has established as a general rule that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. \* \* \* Public opinion, which not even the conqueror can disregard, imposes these restraints upon him, and he can not neglect them without injury to his fame and hazard to his power.

The candid judgment of all must concede "that this Republic has no desire to oppress any of the inhabitants of these islands, but earnestly wishes them peace, prosperity, and the largest degree of liberty consistent with the maintenance of individual rights and collective tranquillity."

Can anyone doubt that President McKinley uttered the sentiments of the nation when, at Boston, in February, 1899, he said:

No imperial design lurks in the American mind. That would be alien to American sentiment, thought, and purpose. Our priceless principles undergo no change under a tropical sun. If we can benefit these people, who will object? If in years they are established in government under law and liberty, who will regret our perils and sacrifices; who will not rejoice in our heroism and humanity? I have no light or knowledge not common to my countrymen. I do not prophesy. The present is all absorbing to me, but I can not bound my vision by the blood-stained trenches around Manila, where every red drop, whether from the veins of an American soldier or a misguided Filipino, is anguish to my heart; but by the broad range of future years, when the group of islands, under the impulse of the year just passed, shall have become the gems and glories of these tropical seas, a land of plenty and of increasing possibilities, a people redeemed from savage indolence and habits, devoted to the arts of peace, in touch with the commerce and trade of all nations, enjoying the blessings of freedom, of civil and religious liberty, of education and of homes,

and whose children and children's children shall, for ages hence, bless the American Republic because it emancipated and redeemed their fatherland and set them in the pathway of the world's civilization.

And that—

The treaty now commits the free and unfranchised Filipinos to the guiding hand and liberalizing influence, the generous sympathies, the uplifting education, not of their American masters, but of their American emancipators.

The *forms*, the ways and means, the governmental agencies by which this Republic will carry out its benevolent purposes and discharge its duties in regard to these islands and their inhabitants, are matters addressed to the discretion of the Congress and are not understood to be within the purport of the inquiries upon which this report is made.

## II.

The decisions of the Supreme Court of the United States regarding the acquisition and government of new territory by the United States established two propositions beyond controversy:

1. The United States as a sovereign nation may acquire and govern new territory.

2. The government of territory acquired and held by the United States belongs primarily to Congress and secondarily to such agencies as Congress may establish for that purpose.

As to these two propositions, the Supreme Court of the United States say:

These propositions are so elementary and so necessarily follow from the condition of things arising upon the acquisition of new territory that they need no argument to support them. They are self evident. (*Mormon Church v. United States*, 136 U. S., 43.)

It is, however, necessary to examine the character and extent of the power of Congress in the matter of such government and legislation. In 1810 the Supreme Court of the United States said:

The power of governing and legislating for territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislature, an executive, and a judiciary, with such powers as it has been their will to assign to those departments. (*Sere v. Pitot*, 6 Cranch, 332, 336, 337.)

In the *United States v. Gratiot et al.* (14 Pet., 526, 537) the court say:

The Constitution of the United States (art. 4, sec. 3) provides "that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limita-



tion, and has been considered the foundation upon which the Territorial governments rest. In the case of *McCulloch v. The State of Maryland* (4 Wheat., 422) the Chief Justice, in giving the opinion of the court, speaking of this article, and the powers of Congress growing out of it, applies it to Territorial governments, and says all admit their constitutionality. And again, in the case of the *American Insurance Company v. Canter* (1 Pet., 542), in speaking of the cession of Florida under the treaty with Spain, he says that Florida, until she shall become a State, continues to be a Territory of the United States Government by that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of Congress over the lands belonging to the United States, the words "dispose of" can not receive the construction contended for at the bar. \* \* \* The disposal must be left to the discretion of Congress.

In *Gibson v. Choteau* (13 Wall., 92, 99) the court say:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.

This must certainly be the rule so long as the territory remains *unorganized*; that is, so long as it remains simply a part of the public domain or property of the United States which has not had conferred upon it the character of a State or a Territory with the rights appertaining to such political entities.

The reason for this is that the territory is acquired by the United States in the exercise of sovereign powers. As was said of Louisiana, "This territory was purchased by the United States in their *confederate capacity*."

The territory when so acquired is held and governed by the sovereign power of the nation until such time as the political branch of the Government—i. e., Congress and the Executive—shall determine whether our tenure be temporary or permanent, and, if permanent, what form and character of local government shall be conferred thereon.

(See authorities above cited.)

Also *Snow v. United States* (18 Wall., 317, 320); *Benner v. Porter* (9 How., 235, 242); *Murphy v. Ramsey* (114 U. S., 15, 44); *National Bank v. Yankton* (101 U. S., 129, 133); *Mormon Church v. United States* (136 U. S., 1, 42).

The sovereign powers of the people of the United States are not limited by the restrictions placed by that sovereign on the instruments and agents by which certain of the functions of the Government maintained by that sovereign are performed.

The sovereign powers existed before the nation was formed. The founding of the nation assembled these sovereign powers, and the question arose as to how these powers and what ones should be distributed. The distribution was at first attempted by the Articles of Confederation. The practical workings under such distribution proved unsatisfactory, and redistribution was made by the adoption of the

Constitution. But not all the powers of sovereignty belonging to sovereign people of the United States were delegated to and distributed among the agencies of government established by the Constitution.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. (Ninth amendment.)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people. (Tenth amendment.)

In the redistribution of sovereign powers made by the people of the United States "in order to form a more perfect Union," and evidenced by the Constitution, it was provided that in all internal and domestic relations the States should continue to exercise all sovereign powers not specifically surrendered to the General Government. Therefore where the power is not conferred by the Constitution the General Government has no authority in matters arising from internal and domestic relations. But in international relations the reverse is true; the General or National Government exercises every sovereign power not expressly prohibited by the Constitution, for the reason that the National Government in our international relations represents the sovereign people; the States have no international standing, powers, or existence.

In the debate on the Louisiana Purchase, Mr. Sanford (Kentucky), in support of the treaty, said:

The Constitution does not prohibit the powers exercised; and not having prohibited them, they must be considered as possessed by the Government. (Annals of Cong., 1803-4, p. 451.)

Under the laws of civilization all sovereign nations have equal rights and equal powers in the broad field of international relations. Their domestic constitutions and varied restrictions are not known.

In the Chinese Exclusion Case our Supreme Court say:

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. (The Chinese Exclusion Case, 130 U. S., 581, 604.)

In *Lane County v. Oregon* the Supreme Court, speaking by Chief Justice Chase, say (7 Wall., 71-76):

The people of the United States constitute one nation under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national

government, acting with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved.

In the case *In re Neagle* (135 U. S., 1) Mr. Justice Lamar (with whom concurred Mr. Chief Justice Fuller) dissented from the decision of the court that the killing of Terry was "an act done in pursuance of a law of the United States" (p. 40). In discussing the foreign relations of the United States Mr. Justice Lamar said (pp. 84, 85):

The Federal Government is the exclusive representative and embodiment of the entire sovereignty of the nation in its united character; for to foreign nations and in our intercourse with them, States and State governments and even the internal adjustment of Federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit.

These sovereign powers are to be exercised by that branch of our Government charged with the maintenance of the international relations of the United States, to wit, Congress and the Executive.

In the *Legal Tender Cases* (12 Wall., 554) Justice Bradley said:

The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in *the Government of the United States*, or in any department or office thereof. As a government it was invested with all the attributes of sovereignty. \* \* \*

The United States is not only a Government, but it is a National Government, and the only government in this country that has the character of nationality. It is invested with power over all foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State government. \* \* \*

Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the Government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the Government as constituted, and vindicating its authority and existence.

Probably no more important case was ever submitted to the Supreme Court of the United States than *McCulloch v. State of Maryland* (4 Wheat., 315). Probably nothing has done more to make the name of Marshall great than the famous opinion which he delivered in that case. With what realizing sense of the importance and far-reaching effect of their action the court entered upon the determination of the

questions presented is shown by the opening words of the opinion (p. 400):

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the Legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

Regarding the character and scope of the legislative power of Congress, the opinion declares (p. 411):

But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department thereof." The counsel for the State of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect, but is really restrictive of the general right, which might otherwise be implied, of selecting the means for executing the enumerated powers. In support of this proposition they have found it necessary to contend that this clause was inserted for the purpose of conferring on Congress the power of making laws; that without it doubts might be entertained whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each House may determine the rule of its proceedings; and it is declared that every bill which shall have passed both Houses shall, before it becomes a law, be presented to the President of the United States. The seventh section describes the course of proceedings by which a bill shall become a law, and then the eighth section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After allowing each House to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature endowed with legislative powers can legislate is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the Government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary can not exist without the other? We think it does not. If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the tenth section of the first article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the General Government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and in its construction the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future times, execute its powers, would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

If we apply this principle of construction to any of the powers of the Government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and

navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the Constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath of office as its wisdom might suggest.

So with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the Government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of Congress. The right to enforce the observance of law by punishing its infraction might be denied with the more plausibility because it is expressly given in some cases.

Congress is empowered “to provide for the punishment of counterfeiting the securities and current coin of the United States” and to “define and punish piracies and felonies committed on the high seas and offenses against the law of nations.” The several powers of Congress may exist in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.

Take, for example, the power “to establish post-offices and post-roads.” This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road from one post-office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post-office or rob the mail. It may be said, with some plausibility, that the right to carry the mail and to punish those who rob it is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice; but courts may exist and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the Government and the absolute impracticability of maintaining it without rendering the Government incompetent to its great objects might be illustrated by numerous examples drawn from the Constitution and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means of carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power and conducive to its beneficial exercise.

If this limited construction of the word “necessary” must be abandoned in order to punish, whence is derived the rule which would reinstate it when the Government would carry its powers into execution by means not vindictive in their nature? If the word “necessary” means “needful,” “requisite,” “essential,” “conductive to,” in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word “necessary” is used in this clause of the Constitution we may derive some aid from that with which it is associated. Congress shall have power “to make all laws which shall be necessary and proper to carry into execution” the powers of the Government? If the word “necessary” was used in that strict and rigorous sense for which the counsel for the State of

Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not strained and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland is founded on the intention of the convention as manifested in the whole clause. To waste time and argument in proving that without it Congress might carry its powers into execution would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove that in the absence of this clause Congress would have some choice of means; that it might enjoy those which, in its judgment, would most advantageously effect the object to be accomplished; that any means adapted to the end—any means which tended directly to the execution of the constitutional powers of the Government—were in themselves constitutional. This clause as construed by the State of Maryland would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons: First, the clause is placed among the powers of Congress, not among the limitations on those powers. Second, its terms purport to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the National Legislature under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been by this clause to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is that if it does not enlarge, it can not be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the Government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

In *Prigg v. Pennsylvania* (16 Peters, 539) Justice Story, in delivering the opinion of the court, said (p. 610):

It will, indeed, probably be found when we look to the character of the Constitution itself, the objects which it seeks to attain, the power which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

The case of *Prigg v. Pennsylvania* (16 Pet., p. 539), from which the above quotation is made, was one in which the court sustained the institution of slavery. This directs attention to a most interesting epoch in our history. The Constitution ordained as follows (art. 4, sec. 2):

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

It has always been conceded that this provision of the Constitution did not operate *ex proprio vigore*. Legislation was required to render it effective. Among the objects designated by the Constitution for which Congress could legislate this is not included. (Sec. 8, art. 1.)

Nevertheless, the slaveholding States demanded and secured the passage of the fugitive slave act, approved February 12, 1793. (1 U. S. Stat., 302.) The Federal courts sustained this legislation, and the opponents of slavery went to work to secure a Congress and an Executive who would exercise the established and conceded power, so as to render this provision of the Constitution nugatory instead of effective. At the same time the question arose of the power of Congress to legislate regarding slavery in the Territories, and the two controversies continued simultaneously, the latter resulting in the Missouri compromise, a measure equally repugnant to both contestants.

Finally it appeared that the opponents of slavery were on the verge of accomplishing their purpose, and had secured the privilege of exercising this power. Thereupon the slaveholding States appealed to the arbitrament of arms, with the result that the institution over which the controversies were waged was destroyed and the powers of Congress to legislate in regard thereto extended so as to displace the authority theretofore exercised by the sovereign States. (Thirteenth amendment to the Constitution.)

The importance of considering this portion of our history arises from the fact that the civil war resulted from the efforts to control a



power of Congress implied from a provision of the Constitution restricting the operation of State laws on the individual ownership of a certain species of property and the power given to "make all needful rules and regulations respecting the territory and other property belonging to the United States."

The first territory over which Congress acquired jurisdiction outside of the boundaries of the thirteen original States was what is known as the Northwest Territory. The title to the land constituting this section of our country was then claimed by several of the original States, and such claim was a serious obstacle to the creation of the Confederation of States. Maryland positively refused to ratify the Articles of Confederation until these lands were ceded to the Federal Government. (A similar controversy as to other lands arose at the time of the adoption of our Constitution, or, to speak accurately, the original controversy continued down to 1802, when Georgia surrendered its claims.) But "The Northwest" became the common property, the public territory, of the United States in 1786.

In 1783, it being evident that the General Government would eventually become the owner of "The Northwest," Congress appointed a committee to report a plan for connecting said Territory with the Confederation and providing a temporary government for the inhabitants. Thomas Jefferson was chairman of that committee, and on the day the cession from Virginia was accepted he reported a plan for the government of said Territory, which, after being subjected to important modifications, was adopted on April 23, 1784. The plan adopted was known as "Jefferson's ordinance," or the "Ordinance of 1784." The plan proved unsatisfactory, and Congress proceeded to legislate anew on the subject. Between May 1, 1786, and July 9, 1787, three ordinances for the government of the Northwest Territory were reported to Congress. (May 10, 1786; September 19, 1786, and April 26, 1787.) Finally, on July 13, 1787, the ordinance of 1787 was adopted. The convention which formulated our Constitution convened on May 25, 1787, pursuant to a resolution of Congress passed February 21, 1787, and finished its labors September 17, 1787. Therefore Congress was considering the ordinance of 1787 at the very time the convention was deliberating over the Constitution.

The importance of considering the ordinance of 1787 in this investigation lies in the fact that the statesmen of that period did not accept the doctrine that the guaranties enjoyed by the inhabitants of the States were possessed by the inhabitants of the Northwest Territory, neither by virtue of the Articles of Confederation nor by the fact that they had theretofore been within the jurisdiction of one of the States. The accepted doctrine was that such guaranties and rights must be conferred by Congress. Hence the ordinance contained six "articles of compact between the original States and the people and States in the said Territory."

The first provided that no peaceable person should "ever be molested on account of his mode of worship or religious sentiments." The second guaranteed to the inhabitants "the benefits of the writ of *habeas corpus*, trial by jury, proportionate representation in the legislature, bail (except for capital offenses), moderate fines and punishments, and the preservation of liberty and property." The article concluded with the declaration "that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed." The third article declared "that schools and means of education should forever be encouraged, and good faith should be observed toward the Indians." The fourth declared "that the territory and States formed therein should forever remain a part of the confederacy, subject to the Articles of Confederation and the authority of Congress under them." The fifth provided for the formation in the territory of not less than three nor more than five States, to be admitted "into the Congress of the United States on an equal footing with the original States in all respects whatever, and to be at liberty to form a permanent constitution and State government, republican in form, and in conformity with the Articles of Confederation." The sixth prohibited slavery in the territory, but permitted the capture and return of fugitive slaves from any one of the original States. (Rev. Stats., 1878, pp. 15 and 16.)

The reasons for these "articles of compact" and the purpose of entering into them is plainly stated by Congress in sections 13 and 14 of the ordinance, as follows:

SEC. 13 And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States at as early periods as may be consistent with the general interest.

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent. (Rev. Stats., p. 15.)

Evidently Congress did not consider the territory and inhabitants privileged and conditioned by the Articles of Confederation nor entitled to statehood with its attendant benefits as an inherent right.

On September 17, 1787, the proposed Constitution of the United States, as agreed upon by the convention, was signed by all the members present except Gerry, of Massachusetts, and Mason and Randolph, of Virginia. The president of the convention transmitted the draft to Congress. On September 28, 1787, Congress directed the Constitution so framed to "be transmitted to the several legislatures in order

to be submitted to a convention of delegates chosen in each State by the people thereof, etc.”

The date fixed by the convention for commencing the operations of government under the new Constitution was March 4, 1789, and on that date the Constitution had been ratified by eleven of the States and became operative. The subsequent ratifications were, North Carolina, November 21, 1789; Rhode Island, May 29, 1789; Vermont, January 10, 1789. During this period the Constitution had been exhaustively examined and discussed in fourteen States (including Vermont) and throughout the nation. It was not acquiesced in by common consent nor accepted as being possessed of the sacred character now conceded it. Almost every one of its provisions was fiercely assailed, and its supporters were put to their utmost endeavor in its defense. Reference is made to this portion of our history to direct attention to the fact that in 1803 the public mind of the entire nation was familiar with the provisions of our Constitution, imbued with its purposes and spirit, and was competent to determine the extent of its intended operation. In 1803 the United States acquired the province of Louisiana. The treaty of cession contained the stipulation:

The inhabitants of the ceded territory shall be *incorporated in the Union of the United States*, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess. (Article 3, Treaty with France, 1803.)

As soon as the treaty ceding the country was ratified, Congress authorized the President to take possession of and occupy the territory ceded, and, for the purposes of maintaining a government therein, provided that the military, civil, and judicial powers exercised by the officers of the existing government were to be vested in such persons as the President should appoint. (Act approved October 31, 1803, 2 U. S. Stats., 245.)

The military, civil, and judicial powers exercised by the officers of the existing government were those created by the Spanish law, which had been continued in force by the French. The only change made by Congress in this act was to substitute President Jefferson for the King of Spain and to declare the purposes of said government to be for maintaining and protecting the inhabitants in the free enjoyment of their liberty, property, and religion. As already stated, many of the laws continued in force by this act were inimical to the Constitution of the United States, and the rights which Congress declared should be maintained are those guaranteed by the Constitution. If Congress had accepted the doctrine that the Constitution was in force in the ceded territory, the President would not have been clothed with the powers of the King of Spain, nor would Congress have provided for the protection of the rights by legislative enactments.

In discussing this bill in Congress, Mr. Rodney, of Delaware, the Administration leader in the House, explained the intent of his party and the doctrine of the bill, as follows:

It shows that Congress have a power in the territories which they can not exercise in the States, and that the limitations of power found in the Constitution are applicable to States and not to Territories. (Annals of Congress, 1803-1804, p. 514; see also, remarks of John Randolph, Id.)

The Administration party selected three of their members of Congress (Rodney, Randolph, and Nicholson) to defend the Louisiana purchase treaty in the debate on the bill to carry it into effect. The treaty gave to the port of New Orleans a decided preference over the ports of the United States. This was urged as an objection to the treaty and the assertion made that such preference was unconstitutional. In reply to this objection Mr. Nicholson, speaking for the Administration, said:

The territory was purchased by the United States in their confederate capacity, and may be disposed of by them at their pleasure. It is in the nature of a colony whose commerce may be regulated without any reference to the Constitution. (Annals of Cong., 1803-4, p. 471.)

That President Jefferson did not consider the territory and the inhabitants privileged and bound by the Constitution has already been referred to in this discussion.

On March 26, 1804, Congress passed another act providing for the government of this territory. (See 2 Stat., 283, 287.) By this act the country ceded by France was divided into two parts, and all north of the thirty-third parallel of north latitude was formed into a district, to be known as the District of Louisiana. Its government was to be administered by the governor, secretary, and judges of the Indiana Territory, whose respective powers were extended over the district. This practically amounted to attaching the district to the Territory of Indiana for judicial and administrative purposes, but the governor and judges were authorized to *make all laws* that might be conducive to good government in the new district, and it was specified that this included the power to establish inferior courts and prescribe their jurisdiction and duties. Certainly this does not indicate that Congress entertained the view that the inhabitants of said territory possessed an inherent right of self-government, or had secured the right by operation of the Constitution. The act contained further provisions that the laws so made should be consistent with the Constitution and the laws of the United States; that they should not interfere with the free exercise of religion, and that trial by jury should always be allowed. Here again is evidence that Congress did not consider the Constitution in force in said territory.

Said act further provided that all of the territory south of the thirty-third parallel was organized as the Territory of Orleans. The execu-

tive power of this Territory was vested in a governor and a secretary. The legislative powers were vested in a governor and a council of thirteen.

In both the Territory of Orleans and the District of Louisiana the laws were to be reported to Congress, and if disapproved were to be of no force. It is to be noted that by this act full legislative powers in both Territories were given to officers in the choosing of whom the people had no voice.

The acts of Congress regarding the establishment of governments in the "Northwest Territory" and the "Louisiana Purchase" are examined at length, for the reason that said legislation has been the basis of all subsequent legislation by Congress regarding the establishment of government in organized Territories of the United States. The governments in the District of Louisiana and the Territory of Orleans were established after the adoption of the Constitution. That the acts of Congress relating thereto contain many provisions which are not in harmony with the Constitution of the United States can not be denied, but the Supreme Court has repeatedly sustained said acts. (*Choteau v. Eckhart*, 2 How., pp. 344, 373; *Permoli v. Municipality*, 3 How., pp. 589, 609; *Clinton v. Englebrecht*, 13 Wall., pp. 434-442.)

An investigation of the negotiations whereby the Louisiana purchase was effected will show that the purpose of the transaction was to secure possession of the Mississippi River and make it a free highway for the transportation of the products of this country, and secure said products unobstructed passage to the markets of the world as then existing. While the negotiation was pending President Jefferson wrote to Mr. Livingston, our minister at Paris, saying to him:

There is one spot on the globe, one single spot, the possessor of which is our natural and habitual enemy. That is New Orleans, through which the produce of three-eighths of our territory must pass to market, and from its fertility it will ere long yield more than one-half of our produce, and contain more than half of our inhabitants.

And he further said:

That if France insisted upon holding New Orleans her position there was so menacing to the welfare of the United States, then lying almost wholly east of the Alleghany Mountains, that it would compel a treaty, offensive and defensive, between the United States and Great Britain.

Even a cursory examination of these negotiations demonstrates that the great object sought to be obtained by the purchase of Louisiana was to secure industrial and commercial benefits therefrom by unimpeded passage to the world's markets. It was water, not land, that Jefferson sought to secure. The acquisition of territory was a minor consideration. To bring the products of the great West into contact with the markets of the world was the primal object. Water routes were the only means of conveyance known in those days. Railroads

were unknown. The products of the West must reach the markets of the world via the mouth of the Mississippi or not at all. That the products of the West would ever be conveyed over the Alleghany Mountains to the tide waters of the Atlantic was not then considered possible. The mouth of the Mississippi at that time bore the same relation to the markets of the world, as then existing, as the Philippines bear to-day to the trade of the Orient.

In creating legislation which shall have effect in territory newly acquired by the United States, Congress is required to bear in mind the distinction between the territory itself and the inhabitants. Certain things appertain to the territory alone, certain things to the inhabitants, and others to both combined.

Discussion has already been had of the proposition that the sovereignty and jurisdiction of the United States may attach to territory without extending the territorial boundaries of the nation to include such territory; and that such territory, so long as it remained outside of the territorial boundaries of the United States, was not bound and privileged by the Constitution.

It is likewise true that territory may be under the sovereignty and jurisdiction of the United States and yet not subject to the laws of the United States enacted before said territory was acquired or without reference to said territory. Statutes possess no innate power of expansion. The geographical limits of the statutes of the United States are the national boundaries at the time of the enactment, unless otherwise provided by the act itself. During its national history the United States has acquired more than 3,250,000 square miles of territory on the continent of North America, outside of the boundaries of the original States. Congress has enacted more than one hundred special acts for the purpose of extending over this vast domain the Constitution and laws of the United States, "*not locally inapplicable*," and Alaska still remains to be dealt with. The Constitution and Federal laws have not been made operative therein, excepting the laws relating to customs, commerce, and navigation. (U. S. Rev. Stats., sec. 1954.) It is unorganized territory governed by and legislated for by special acts of Congress, enacted as circumstances required and conditions justified.

It could not candidly be contended that all territory considered merely as land has an innate, inherent right to the privileges guaranteed by the Constitution or the spirit of our institutions to the territory constituting the United States. For instance, if an American voyager were to discover an uninhabited island which was rich in mineral resources, contained large deposits of guano and phosphates, streams teeming with fish, extensive forests of valuable woods, fruits, and nuts, animals with valuable furs and skins, coral, oysters, and pearls in abundance, and should take possession thereof in the name of

the United States, would such American citizen be permitted to land these natural products of the island in the United States without other restriction than is imposed on the coasting trade between different parts of the United States? Such is not the accepted doctrine. (See Guano Islands, title 72, Rev. Stats., 1878, p. 1080.)

The action of the discoverer does not benefit the island, except in this, that it affords an opportunity to the political branch of the Government of the United States to attach the sovereignty, dominion and jurisdiction of the United States to the territory, and thereafter confer upon it such privileges as to the political branch seem just and proper. When the rights of the United States have their inception in conquest and are maintained as such, the result is the same as from discovery. But if the rights of the territory so acquired are made the subject of a stipulation in the treaty of peace terminating the war in which the conquest was made, or in any treaty, the United States becomes bound and the territory to that extent benefited by the terms of the national compact. But the rights of the territory are inchoate and are derived from the treaty. They are guaranteed by the nation's honor, not by the Constitution. The territory itself can not insist upon the fulfillment of the compact. The undertaking is with the previous sovereign. The time and manner of its performance is to be determined by the United States. The territory secured by the conquest of Mexico is an instance in point. The United States based its title to Upper California and New Mexico on conquest, but in order to effect a peace bound itself by treaty stipulations: that the territory so acquired should be incorporated into the Union of the United States. (9 Stat., 930.)

If the purpose of this treaty stipulation was to secure the eventual admission of the conquest as a State, the obligation has been in part discharged by the admission of California and is yet existing as to New Mexico.

New Mexico has been made an organized Territory, and now seeks admission as a State; but the claims presented by the Territory are founded on the fact that its population is sufficient and of such character, and its internal development advanced to such degree, that the time has arrived for it to receive the privileges agreed upon in the treaty with its former sovereign. It appeals to the discretion of Congress, not to the fixed principles or unvarying provisions of the Constitution.

Whatever incipient right to statehood exists in favor of New Mexico comes from the treaty of 1848, and not from the Constitution.

It is true that in expressing his views on the Dred Scott case Chief Justice Taney announced the doctrine that the United States could acquire territory for no other purpose than to convert into States of the Union, and that all territory acquired by the United States was

charged with a trust requiring ultimate admission as a State. The language used by Chief Justice Taney is as follows:

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given, and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State and the Federal Government. But no power is given to acquire a territory to be held and governed permanently in that character. \* \* \*

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. (*Dred Scott v. Sandford*, 19 How., 393-446, 447.)

The doctrine thus announced by Chief Justice Taney, that the United States could acquire territory only for the purpose of creating States, was accepted by the court as then constituted. Whether the language quoted is mere *dictum*, as is often asserted, or was the vital point in that case, as is now contended, is not essential in this investigation for the following reason: That doctrine rests upon the proposition that the authority of the United States to acquire territory is derived solely from the power to create and admit new States, which power is conferred upon Congress by section 3 of Article IV of the Constitution. The *Dred Scott* case is the only case in which this proposition has ever been accepted. What is popularly supposed to have led to its acceptance in that case is matter of history, not of law. It is sufficient for the purposes of this investigation to call attention to the fact that Chief Justice Taney's major premise was in direct contravention of the doctrines established by the prior decisions of the court and by the course of Congressional action, and has been ignored and completely overthrown by the subsequent decisions of the court, to say nothing of the tremendous results of the civil war.

The right of the United States to acquire territory was at first held to arise from the power conferred upon Congress by the Constitution—

1. To carry on war. (Clause 11, sec. 8, Art. I.)

And the power conferred upon the President and Senate—

2. To make treaties. (Clause 2, sec. 2, Art. II.)

Finally, the court, the Congress, and the nation recognized that the United States is a sovereign nation, and that the right to acquire territory is an inherent attribute of sovereignty, and thereupon this right



of the United States was declared to rest upon the abiding foundation—

3. The sovereignty of the United States. (*American Ins. Co. v. Canter*, 1 Peters, 511, 541; *Mormon Church v. United States*, 136 U. S., 42; *United States, Lyon et al., v. Huckabee*, 16 Wall., 414, 434; *Jones v. United States*, 137 U. S., 202, 212.)

That the doctrine announced by Chief Justice Taney in the *Dred Scott* case was in direct contravention of the understanding and course inaugurated by the founders of our Government and thereafter followed by Congress is manifest from an examination of the national compact with the Northwest Territory (1787), the Louisiana Purchase treaty (1803), the treaty with Spain regarding Florida (1819), the treaty with Mexico regarding Upper California and New Mexico (1848), and Alaska (1867).

One of the articles of the national compact with the Northwest Territory (1787) contained the following pledge:

There shall be formed in the said Territory not less than three nor more than five States. \* \* \* And \* \* \* such State shall be admitted \* \* \* on an equal footing with original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government. (See Rev. Stat. U. S., p. 16, article 5.)

Why was this compact entered into if the Territory was already charged with a trust in favor of statehood, and the United States without authority to acquire it for any other purpose?

In the treaty for the cession of Louisiana the United States obligated itself that—

The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States. (Article 3, 8 U. S. Stat., 202.)

In the treaty with Spain whereby was confirmed the title of the United States to the Floridas, the United States obligated itself that—

The inhabitants of the Territories \* \* \* shall be incorporated in the Union of the United States as soon as it may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States. (Article 6, 8 Stat., 256.)

In the treaty with Mexico, whereby Mexico relinquished its rights to Upper California and New Mexico, the United States obligated itself that—

The Mexicans who, in the Territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article, shall be incorporated in the Union of the United States and to be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution. (Article 9, 9 Stat., 930.)

In the treaty with Russia whereby the United States acquired title to Alaska the United States obligated itself that—

The inhabitants of the ceded territory \* \* \* should be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. (Article 3, 15 Stat., 542.)

For what purpose and to what end were these treaty stipulations created, if by the *act of acquisition* the territory became charged with a trust in favor of statehood and the United States required by its Constitution to execute said trust?

The doctrine announced in the Dred Scott decision was not original with Chief Justice Taney. It was originated by John C. Calhoun and announced by him during the discussion of the Wilmot proviso in 1847. Regarding its origin Thomas H. Benton says:

A new dogma was invented to fit the case—that of the transmigration of the Constitution (the slavery part of it) into the Territories, overriding and overruling all the antislavery laws which it found there, and planting the institution there under its own wing, and maintaining it beyond the power of eradication either by Congress or the people of the Territory. Before this dogma was proclaimed efforts were made to get the Constitution extended to these Territories by act of Congress. Failing in those attempts, the difficulty was leaped over by boldly assuming “that the Constitution went of itself”—that is to say, the slavery part of it. In this exigency Mr. Calhoun came out with his new and supreme dogma of the transmigratory function of the Constitution in the ipso facto, and the instantaneous transportation of itself in its slavery attributes, into all acquired Territories.

And as to the doctrine itself, Benton says:

History can not class higher than as the vagary of a diseased imagination this imputed self-acting and self-extension of the Constitution. The Constitution does nothing of itself—not even in the States, for which it was made. Every part of it requires a law to put it into operation. No part of it can reach a Territory unless imparted to it by act of Congress. (Benton’s Thirty Years in the Senate, vol. 2, pp. 713, 714.)

The conclusion seems irresistible that the sovereign people of the United States, in acquiring territory by the exercise of the inherent right of sovereignty, secure said territory free and clear of incumbrances other than it sees fit to impose upon itself by treaty stipulation or other agreement entered into with direct reference to said territory. A different conclusion can only be reached by conceding that the sovereign people of the United States, acting in a sovereign capacity, are not possessed of the powers which constitute sovereignty. The sovereign people of the United States, while acting as a political unit, possess every attribute of the most potential sovereignty. (Cohens v. Virginia, 6 Wheat., 264; McCulloch v. Maryland, 4 Wheat., 405; Lane Co. v. Oregon, 7 Wall., 71, 76; Legal Tender Cases, 12 Wall., 533; The Chinese Exclusion Case, 130 U. S., 581, 604; In re Neagle, 135 U. S., 1, 84–88 (dissenting opinion of Fuller, Ch. J., and Lamar, J.).

While the court have declared these powers, so exercised, to be of broad extent and of exclusive character, they have not omitted to refer to certain limitations thereto and restrictions thereon.

In *Mormon Church v. United States* (136 U. S., 42) the court say:

The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints, and, secondly, as to the power of Congress and the courts to seize the property of said corporation and to hold the same for the purposes mentioned in the decree.

The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire territory other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the Territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the Government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting these Territories. Having rightfully acquired said Territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the conditions of things arising upon the acquisition of new territory that they need no argument to support them. They are self-evident.

After thus declaring the powers of Congress the court further say (p. 44):

Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are *formulated* in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.

The case of *Thompson v. Utah* was decided by the court as now constituted, and therein the court, quoting from *Mormon Church v. United States*, again say (170 U. S., 345, 349):

Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are *formulated* in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.

Attention is directed to the use by the court of the expression "*formulated* by the Constitution," rather than created, conferred, or guaranteed by the Constitution, showing that the court had reference to "fundamental limitations" on legislative powers arising from the

primal, inherent rights of men—rights which do not arise from constitutional provisions and antedate all governments, such as life, liberty, acquisition of property, formation of a family and begetting offspring, and other rights of like character. Such rights are not created or conferred by governments. They are protected, maintained, and promoted by all just governments, and their exercise regulated and controlled, and in proper individual instances taken away; but it is not the *right*, it is the *regulation* which originates with government. When we undertake to consider such rights in the abstract, we rise above constitutions and statutory enactments and enter the realm of ethics, and must deal with the laws of civilization and the spirit engendered by nineteen Christian centuries.

All the powers of the Government of the United States are limited and controlled by these higher laws, for the reason that the sovereign, i. e., the people of the United States, recognize their controlling power, and if an officer exercises his discretion in violation thereof, the sovereign displaces him and secures an incumbent whose discretion coincides therewith. Not even the Constitution is exempt. For instance, the Constitution plainly confers upon Congress the right to "grant letters of marque and reprisal." (Art. I, sec. 8.) Had a citizen of the United States, during the late war with Spain, applied to Congress for such letters, asserting his claim as one of right guaranteed by the Constitution, would the letters have been issued? If not, why? The interrogatory is best answered by the language of Chief Justice Marshall when he says:

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

In investigating the status of the inhabitants of territory newly acquired by the United States, title to which is based upon conquest, it is necessary to bear in mind the difference between political privileges and personal rights.

Political privileges, in the sense in which the term is used at this point of this discussion, are created and conferred by the political laws, i. e., the laws fixing and regulating the relations between the citizen and the sovereign. The personal rights to be considered are those inherent to man, such as "life, liberty, and the pursuit of happiness." The most sacred of these is life. Let that right be taken, for an example. Sacred as is the right to life, it is suspended in the presence of war. Conquest results from invasion, invasion from war. Time was

when war meant extermination, invasion death to the inhabitants, and conquest slavery. Civilized nations no longer put the inhabitants of invaded territory to the sword, although at one time it was done by Divine command. Why was the practice abandoned? Was it because the American colonies issued the Declaration of Independence? Was it in compliance with the requirements of the Constitution of the United States? Or is the restraint enforced by the laws of civilization and the spirit of the age? Are not the Declaration of Independence and the Constitution of the United States as powerless to enforce this restraint as the command of Moses is to remove it?

In dealing with the inhabitants of newly acquired territory, it is the spirit of the Constitution, the character of our institutions, and the laws of humanity and civilization that impose restraints, in the absence of treaty stipulations in regard thereto.

The Supreme Court of the United States say:

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he can not neglect them without injury to his fame and hazard to his power. (*Johnson v. McIntosh*, 8 Wheat., 543, 589.)

In *Brown v. United States* (8 Cranch, 110), the court say (122, 123):

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation the judicial department must give effect to its will.

Substantially the same thing was said in *Young v. United States* (97 U. S., 39, 60). The language of the court in that case was:

All property within any enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war, and if it is hostile property subject to capture.

But in another case, that of *Mrs. Alexander Cotton* (2 Wall., 404, 419), the Supreme Court say:

This rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions.

See also *Briggs v. United States* (143 U. S., 346, 356), wherein the court quote with approval the decisions above referred to.

It will be noticed that in none of these cases does the court suggest that the limitations on this sovereign power are created by the Constitution of the United States.

It is with reference to these higher laws and most potent spirit that the Supreme Court say:

The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government. (*Murphy v. Ramsay*, 114 U. S., 15, 44-45.)

And also (to quote a third time):

Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions. (*Mormon Church v. United States*, 136 U. S., 1, 44; *Thompson v. Utah*, 170 U. S., 343, 349.)

Alaska is an existing instance of unorganized territory belonging to the United States and governed directly and entirely by Congressional legislation.

Regarding the powers of Congress in legislating for Alaska, Dawson, J., said:

Possessing the power to erect a Territorial government for Alaska, *they could confer upon it such powers, judicial and executive, as they deemed most suitable to the necessities of the inhabitants.* It was unquestionably within the constitutional power of Congress to withhold from the inhabitants of Alaska *the power to legislate and make laws.* In the absence, then, of any lawmaking power in the Territory, to what source must the people look for the laws by which they are to be governed? This question can admit of but one answer. Congress is the *only* lawmaking power for Alaska. (*United States v. Nelson*, 29 Fed. Rep., pp. 202, 205, 206.)

In *Endleman v. United States*, speaking of the powers of Congress in legislating for Alaska, the court say (86 Fed. Rep., 456):

Congress has full legislative power over the Territories, unrestricted by the limitations of the Constitution. (Syllabus.)

In the body of the opinion the court said (p. 459):

The United States, having rightfully acquired the territory, and being the only Government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and State: \* \* \* It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people.

This case was decided by the United States circuit court of appeals, ninth circuit, February 28, 1898.

Speaking with reference to the government of *organized* Territories and their inhabitants, the Supreme Court say:

Their people do not constitute a sovereign power. *All* political authority exercised therein is *derived* from the *General Government*. (*Snow v. United States*, 18 Wall., 317, 320.)

It will be noticed that the source of the designated authority is declared by the court to be the "General Government," not the Constitution. This decision is a clear recognition of the sovereign power vested in the General Government, and which is exercised independent of the Constitution.

If this is the rule as to organized Territories, peopled as they have been by immigration from the older communities of the nation, by our own citizens, who at home possessed the rights of citizenship and participated in the sovereignty, many of whom entered the Territory to avail themselves of special privileges bestowed upon them in recognition of their valor in defense of the nation, is a more advantageous rule to be applied to unorganized territory, largely peopled by an alien race, ignorant of our laws, customs, and institutions, unable to distinguish the difference between the Constitution of the United States and a map of the country, and as incapable, at present, of properly applying its complex provisions and diverse agencies as they would be those of the switch board of a union railway station?

It therefore seems incontrovertible that the unorganized territory of the United States is not bound and benefited by the Constitution and laws of the United States until Congress has made appropriate provision therefor. And if Congress shall by appropriate action extend the territorial boundaries of the United States to include the islands acquired by the nation during the late war with Spain, and thereafter continue said islands in the condition of unorganized territory governed by the sovereign powers of the nation, the exercise of said sovereign powers will not be directed, limited, or controlled by the expressed provisions of the Constitution.

All the functions of government being within the legislative discretion, Congress may exercise them directly or through organized agencies for local rule.

"All the discretion which belongs to the legislative power is vested in Congress" (114 U. S., 44), and therefore "the power of Congress over the Territories is general and plenary." (136 U. S., 42.)

### III.

Congress having determined to change unorganized territory belonging to the United States into organized territory and invest it with the powers of government known as Territorial, is Congress thereupon and thereafter under obligation to provide laws and a government for it which shall fulfill all the guarantees of political independence

and rights of citizenship which are provided for by the Constitution of the United States for citizens domiciled within the territorial boundaries of the United States? In other words, does the Constitution, *ex proprio vigore*, extend over said territory?

Throughout our entire history Congress has adhered to the doctrine that the great powers and appurtenant rights created and conferred by the Constitution were not inherent to all people, but were to be bestowed upon them, the bestowal to be made upon those only who possessed the ability and determination to properly exercise them. Hence the requirements of the naturalization laws.

Congress and the Executive are to judge of the fitness of the applicants for such bestowal and the tests by which they are to be tried. Hence the authority to enact the Chinese, contract labor, and pauper exclusion acts. Hence the right to fix the time when organized Territories shall be admitted into the Union as States and the people thereof acquire the sovereign rights of a State. Acting upon the theory that the Constitution did not, *ex proprio vigore*, extend over the territory of the United States outside of the boundaries of the several States, Congress has given force and effect to the Constitution and laws of the United States in the organized Territories by legislative enactment. The act to establish a Territorial government for New Mexico (1850) contained the following provision:

SEC. 17. *And be it further enacted*, That the Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within said Territory of New Mexico as elsewhere within the United States. (9 Gen. Stats. of U. S., chap. 49, p. 452.)

Similar legislation has been had in regard to other organized Territories, as follows: Utah, vol. 9, Stat. L., p. 458, chap. 51, sec. 17; Colorado, vol. 12, p. 176, chap. 59, sec. 16; Dakota, vol. 12, p. 244, chap. 86, sec. 16; Idaho, vol. 12, p. 813, chap. 117, sec. 13; Montana, vol. 13, p. 91, chap. 95, sec. 13; Wyoming, vol. 15, p. 183, chap. 235, sec. 16; District of Columbia, vol. 16, p. 426, chap. 62, sec. 34.

Finally in the "Act to revise and consolidate the statutes of the United States," approved June 22, 1874, Congress made general provision as follows:

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the *organized* Territories, and in every Territory *hereafter organized* as elsewhere in the United States. (Revised Statutes of the United States, sec. 1891.)

The expression "organized Territories" and "every Territory hereafter organized," appearing in this statute, refers to the political subdivisions known as Territories, in which Territorial governments have been or may be organized. (See title 23, chaps. 2 and 3, Rev. Stats.) It can not be interpreted to mean unorganized territory considered as an expanse of country, nor can "every Territory hereafter *organized*"



be held to mean every foot of land hereafter *acquired*. (See title 23, chap. 3, p. 342, Rev. Stats., U. S.)

When the various new States were admitted into the Union their territory and inhabitants derived the benefits and were subjected to the obligations of the Constitution by virtue of the act of admission, which invariably contains the provision that said State is "admitted into the Union on an equal footing with the original States in all respects whatever."

The opinion of Chief Justice Marshall in *Loughborough v. Blake* (5 Wheat., 317) is often cited as sustaining the doctrine that the Constitution is in force *ex proprio vigore* in the Territories. The name of Marshall is one to conjure with; and when he speaks regarding the Constitution it behooves a person desiring an understanding of that instrument "to write his sayings in a book."

The case of *Loughborough v. Blake* was an action of trespass, to try the right of Congress to impose a direct tax on the District of Columbia. Chief Justice Marshall stated the issue as follows:

This case presents to the consideration of the court a single question. It is this: Has Congress a right to impose a direct tax on the District of Columbia?

In answering this question affirmatively, Chief Justice Marshall said (pp. 318-319):

The eighth section of the first article gives to Congress the "power to lay and collect taxes, duties, imposts, and excises," for the purposes thereafter mentioned. This grant is general, without limitation as to place. It consequently extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, "But all duties, imposts, and excises shall be uniform throughout the United States." It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our Great Republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.

What was it extended "to all places over which the Government extends?" Clearly it was "the power to impose taxes." The power of taxation is a sovereign right of Government. One of those rights which Marshall was eager to establish belonged to the General or Federal Government.

That the Chief Justice did not intend to declare the Constitution to be in force in the District of Columbia appears clearly when the facts upon which the action was founded are known.

The law assailed by the taxpayers was a special act imposing a direct tax upon the District *alone*. That is, the act did not impose a tax upon the country at large and simply require the District to pay a share proportionate with that of the several States. The taxpayers directed attention to the following provisions of the Constitution:

The Congress shall have power to lay and collect taxes. (Sec. 8, clause 1, Art. I.)

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. (Sec. 2, clause 3, Art. I.)

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. (Sec. 9, clause 4, Art. I.)

The protesting property owners of the District contended that Congress was not authorized to impose a direct tax except in those parts of the country afforded Representatives in Congress and embraced in the language "the several States which may be included within this Union;" and if this contention was not sustained, and the power of Congress to impose a direct tax extended beyond the States of the Union, the Constitution required that the amount to be raised by such tax "be apportioned among the several States" and not confined to one, to wit, the District of Columbia.

Regarding this contention Chief Justice Marshall said (pp. 322-323):

We think a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the Constitution which have been recited.

That the general grant of power to lay and collect taxes is made in terms which comprehend the District and Territories as well as the State is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community. The words in which those clauses are expressed import this intention. In thus regulating its exercise a rule is given in the second section of the first article for its application to the respective States. The rule declares how direct taxes upon the States shall be imposed. They shall be apportioned upon the several States according to their numbers. If, then, a direct tax be laid at all, it must be laid on every State, conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. But this regulation is expressly confined to the States and creates no necessity for extending the tax on the District or Territories. The words of the ninth section do not in terms require that the system of direct taxation, when resorted to, shall be extended to the Territories, as the words of the second section require that it shall be extended to all the States. They, therefore, may, without violence, be understood to give a rule when the Territories shall be taxed without imposing the necessity of taxing them.

Loughborough v. Blake was decided in 1820. In 1828 the American Ins. Co. v. Canter (1 Pet., 511) was presented to the court, Chief Justice Marshall presiding. In the course of his argument of that cause, Mr. Daniel Webster, discussing the condition of Florida, then a Territory, said (p. 538):

What is Florida? It is not part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions. The Territory and all within it are to be governed by the *acquiring power*, except where there are reservations by treaty. By the law of England, when possession is taken of territory, the King, *Jure Coronae*, has the power of legislation until Parliament shall interfere. Congress has the *Jus Coronae* in this case, and Florida was to be governed by Congress as she thought proper. What has Congress done? She might have done anything—she might have refused the trial by jury, and refused a legislature. She has given a legislature to be exercised at her will.

Mr. Whipple, who was associated with Mr. Webster in the case, said (p. 533):

Much argument has been used in order to show that the Constitution and laws of the United States are, *per se*, in force in Florida, and that the inhabitants are citizens of the United States.

How the Constitution became of force in Florida has not been shown. Was it by the act of cession? Is there any principle in the *law of nations* which, upon the act of cession or conquest, gives to the ceded or conquered country a right to participate in the privileges of the Constitution of the parent country? The usages of nations from the period of Grecian colonization to the present moment are precisely the reverse. Such a right never was asserted.

The Constitution was established by the people of the United States for the United States. It provides for the future admission of Territories into the Union, and expressly confers upon Congress the power of governing them *as Territories* until they are admitted as States.

If the Constitution is in force in Florida, why is it not represented in Congress? Why was it necessary to pass an act of Congress extending several of the laws of the United States to Florida? Why did Congress designate particular laws, such as the crimes act, the slave trade, and revenue acts, and introduce them as laws into Florida? Why enumerate particular rights secured to the people of the United States, if the inhabitants of Florida were entitled to them upon the act of cession?

This case was heard in the circuit court by Mr. Justice Johnson, of the Supreme Court. He delivered his opinion in writing. Therein he said (see note, 1 Pet., 517):

It becomes indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States, and give a correct construction to the second section of the act of Congress, of May the 26th, 1824, respecting the Territorial government of Florida. Correct views on these two subjects will dispose of all the points that have been considered in argument.

And, first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest), *within* the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the State or Territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty.

The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the Crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is that the Government and laws of the United States do not extend to such territory by the mere act of cession. For, in the act of Congress of March 30, 1822, section 9, we have an enumeration of the acts of Congress,

which are to be held in force in the territory; and, in the tenth section, an enumeration in the nature of a bill of rights, of privileges, and immunities which could not be denied to the inhabitants of the territory, if they came under the Constitution by the mere act of cession.

As, however, the opinion of our public functionaries is not conclusive, we will review the provisions of the Constitution on this subject.

At the time the Constitution was formed the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted, in part, of organized States, and, in part, of Territories, the absolute property and dependencies of the United States. These States, this Territory, and future States to be admitted into the Union are the sole objects of the Constitution. There is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.

The right therefore of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new States into the Union; and the government of such acquisitions is of course left to the legislative power of the Union, as far as that power is uncontrolled by treaty. By the latter we acquire either positively or *sub modo*, and by the former dispose of acquisitions so made; and in case of such acquisitions I see nothing in which the power acquired over the ceded territories can vary from the power acquired under the law of nations by any other government over acquired or ceded territory.

The United States Supreme Court affirmed the decision of Mr. Justice Johnson. The Court, speaking by Chief Justice Marshall, say (1 Pet., 541-542):

The course which the argument has taken will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provisions: "The inhabitants of the territories which his Catholic Majesty ceded to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution; and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent

of stipulation. They do not, however, participate in political power; they do not share in the Government till Florida shall become a State. In the meantime Florida continues to be a Territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Which ever may be the source whence the power is derived the possession of it is unquestioned. In execution of it Congress, in 1822, passed "An act for the establishment of a Territorial government in Florida;" and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act the Territorial legislature enacted the law now under consideration.

The vital question in *American Insurance Company v. Canter* was the power of Congress to authorize the Territorial legislature to confer jurisdiction of cases in admiralty upon Territorial courts. It was insisted that the Constitution gave exclusive jurisdiction of such matters to the Federal courts (Art. III, sec. 2); that the Constitution was in force in Florida, and therefore the acts of the Territorial legislature giving jurisdiction in admiralty cases to the Territorial courts was in violation of the Constitution.

It was against this proposition that Mr. Webster and Mr. Whipple contended, and in such contention were sustained by the Supreme Court.

It was this proposition which was denied by Mr. Justice Johnson, sitting as circuit justice, and the denial affirmed by the Supreme Court.

As to this proposition, the court say (p. 546):

It has been contended that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one Supreme Court, and in such inferior courts as Congress shall, from time to time, ordain and establish." Hence, it has been argued that Congress can not vest admiralty jurisdiction in courts created by the Territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges of both the Supreme and inferior courts shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation

does not extend to the Territories. In legislating for them Congress exercises the combined powers of the General and of a State government.

We think, then, that the act of the Territorial legislature erecting the court by whose decree the cargo of the *Point a Petre* was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court awarding restitution of the property to the claimant ought to be affirmed with costs.

Twenty years later Daniel Webster was again called upon to refute the doctrine against which he had successfully contended in this case. The forum was the Senate of the United States, and the occasion was his famous debate with John C. Calhoun. It was by reason of showing the fallacy of this dogma that he gained the name "Expounder of the Constitution," and was adjudged worthy to rank with Chief Justice Marshall himself.

The question of extending the Constitution and laws of the United States to Upper California and New Mexico upon the acquisition of that territory from Mexico gave rise to a heated debate in Congress. That debate is described by Benton, then a Senator, in chapter 182, volume 2, page 729, of his famous work, *Thirty Years in the United States Senate*, as follows:

The treaty of peace with Mexico had been ratified in the session of 1847-48, and all the ceded territory became subject to our Government and needing the immediate establishment of Territorial governments; but such were the distractions of the slavery question that no such governments could be formed nor any law of the United States extended to these newly acquired and orphan dominions. Congress sat for six months after the treaty had been ratified making vain efforts to provide government for the new territories, and adjourning without accomplishing the work. Another session had commenced and was coming to a close with the same fruitless result. Bills had been introduced, but they only gave rise to heated discussion. In the last days of the session the civil and diplomatic appropriation bill—the one which provides annually for the support of the Government, and without the passage of which the Government would stop—came up from the House to the Senate. It had received its consideration in the Senate, and was ready to be returned to the House, when Mr. Walker, of Wisconsin, moved to attach to it, under the name of amendment, a section providing a temporary government for the ceded territories and extending an enumerated list of acts of Congress to them. It was an unparliamentary and disorderly proposition, the proposed amendment being incongruous to the matter of the appropriation bill and in plain violation of the obvious principle which forbade extraneous matter, and especially that which was vehemently contested from going into a bill upon the passage of which the existence of the Government depended. The proposition met no favor; it would have died out if the mover had not yielded to a Southern solicitation to insert the extension of the Constitution into his amendment, so as to extend that fundamental law to those for whom it was never made, and where it was inapplicable and impracticable. The novelty and strangeness of the proposition called up Mr. Webster, who said:

"It is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us, and especially that we should seek to get some conception of what is meant by the proposition, in a law 'to extend the Constitution of the United States to the Territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of

the legislative power in such a manner as that. The Constitution—what is it? We extended the Constitution of the United States by law to territory! What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall be represented in the legislature which it establishes, with not only a right of debate and a right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice-President? And can we by law extend these rights, or any of them, to a Territory of the United States? Everybody will see that it is altogether impracticable. It comes to this, then, that the Constitution is to be extended as far as practicable. But how far that is to be decided by the President of the United States, and therefore he is to have absolute and despotic power. He is the judge of what is suitable and what is unsuitable, and what he thinks suitable is suitable and what he thinks unsuitable is unsuitable. He is *omnis in hoc*, and what is this but to say, in general terms, that the President of the United States shall govern this Territory as he sees fit till Congress makes further provision.

"Now, if the gentleman will be kind enough to tell me what principle of the Constitution he supposes suitable—what discrimination he can draw between suitable and unsuitable which he proposes to follow, I shall be instructed. Let me say that in this general sense there is no such thing as extending the Constitution. The Constitution is extended over the United States, and over nothing else. It can not be extended over anything except over the old States and the new States that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, and especially professional and judicial gentlemen. It seems to be taken for granted that the right of trial by jury, the habeas corpus, and every principle designed to protect personal liberty is extended by force of the Constitution itself over every new Territory. That proposition can not be maintained at all. How do you arrive at it by any reasoning or deduction? It can only be arrived at by the loosest of all possible constructions. It is said that this must be so, else the right of the habeas corpus would be lost. Undoubtedly these rights must be conferred by law before they can be enjoyed in a Territory."

It was not Mr. Walker, of Wisconsin, the mover of the proposition, that replied to Mr. Webster; it was the prompter of the measure that did it, and in a way to show immediately that this extension of the Constitution to Territories was nothing but a new scheme for the extension of slavery. Denying the power of Congress to legislate upon slavery in Territories—finding slavery actually excluded from the ceded Territories and desirous to get it there—Mr. Calhoun, the real author of Mr. Walker's amendment, took the new conception of carrying the Constitution into them, which, arriving there, and recognizing slavery, and being the supreme law of the land, it would override the antislavery laws of the Territory and plant the institution of slavery under its *agis* and above the reach of any Territorial law or law of Congress to abolish it. He therefore came to the defense of his own proposition, and thus replied to Mr. Webster:

"I rise, not to detain the Senate to any considerable extent, but to make a few remarks upon the proposition first advanced by the Senator from New Jersey, fully indorsed by the Senator from New Hampshire, and partly indorsed by the Senator from Massachusetts, that the Constitution of the United States does not extend to the Territories. That is the point. I am very happy, sir, to hear this proposition thus asserted, for it will have the effect of narrowing very greatly the controversy between the North and the South as it regards the slavery question in connection with the Territories. It is an implied admission on the part of those gentlemen that if the Constitution does extend to the Territories the South will be protected in the enjoyment of its property—that it will be under the shield of the Constitution. You can put no other interpretation upon the proposition which the gentlemen have made

than that the Constitution does not extend to the Territories. Then the simple question is, Does the Constitution extend to the Territories, or does it not extend to them? Why, the Constitution interprets itself. It pronounces itself to be the supreme law of the land."<sup>a</sup>

When Mr. Webster heard this syllogistic assertion, that the Constitution being the supreme law of the land, and the Territories being a part of the land, *ergo* the Constitution being extended to them would be their supreme law; when he heard this he called out from his seat: "What land?" Mr. Calhoun replied, saying:

"The land; the Territories of the United States are a part of the land. It is the supreme law, not within the limits of the States of this Union merely, but wherever our flag waves—wherever our authority goes, the Constitution in part goes, not all its provisions certainly, but all its suitable provisions. Why, can we have any authority beyond the Constitution? I put the question solemnly to gentlemen; if the Constitution does not go there, how are we to have any authority whatever? Is not Congress the creature of the Constitution; does it not hold its existence upon the tenure of the continuance of the Constitution; and would it not be annihilated upon the destruction of that instrument, and the consequent dissolution of this confederacy? And shall we, the creature of the Constitution, pretend that we have any authority beyond the reach of the Constitution? Sir, we are told, a few days since, that the courts of the United States had made a decision that the Constitution did not extend to the Territories without an act of Congress. I confess that I was incredulous, and am still incredulous that any tribunal, pretending to have a knowledge of our system of government, as the courts of the United States ought to have, could have pronounced such a monstrous judgment. I am inclined to think that it is an error which has been unjustly attributed to them; but if they have made such a decision as that, I for one say that it ought not and never can be respected. The Territories belong to us; they are ours; that is to say, they are the property of the thirty States of the Union; and we, as the representatives of those thirty States, have the right to exercise all that authority and jurisdiction which ownership carries with it."

Mr. Webster replied with showing that the Constitution was made for the States, not Territories; that no part of it went to a Territory unless specifically extended to it by act of Congress; that the Territories from first to last were governed as Congress chose to govern them, independently of the Constitution and often contrary to it, as in denying them representatives in Congress, a vote for President and Vice-President, the protection of the Supreme Court; that Congress was constantly doing things in the Territories without constitutional objection (as making mere local roads and bridges) which could not be attempted in a State. He argued:

"The Constitution, as the gentleman contends, extends over the Territories. How does it get there? I am surprised to hear a gentleman so distinguished as a strict constructionist affirming that the Constitution of the United States extends to the Territories without showing us any clause in the Constitution in any way leading to that result, and to hear the gentleman maintaining that position without showing us any way in which such a result could be inferred increases my surprise. One idea further upon this branch of the subject. The Constitution of the United States extending over the Territories, and no other law existing there! Why, I beg to know how any government could proceed, without any other authority existing there than such as is created by the Constitution of the United States? Does the Constitution of the United States settle titles to land? Does it regulate the rights of property? Does it fix the relations of parent and child, guardian and ward? The Constitution of the United States establishes what the gentleman calls a confederation for certain great purposes, leaving all the great mass of laws which is to govern society to derive their existence from State enactments. That is the just view of the state of things under

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<sup>a</sup> In 1821, while Secretary of War during Monroe's Administration, Calhoun entertained contrary views. (See *post* p. 140.)



the Constitution. And a State or Territory that has no law but such as it derives from the Constitution of the United States must be entirely without any State or Territorial government. The honorable Senator from South Carolina, conversant with the subject as he must be from his long experience in different branches of the Government, must know that the Congress of the United States have established principles in regard to the Territories that are utterly repugnant to the Constitution.

"The Constitution of the United States has provided for them an independent judiciary; for the judge of every court of the United States holds his office upon the tenure of good behavior. Will the gentleman say that in any court established in the Territories the judge holds his office in that way? He holds it for a term of years and is removable at Executive discretion. How did we govern Louisiana before it was a State? Did the writ of *habeas corpus* exist in Louisiana during its Territorial existence? Or the right to trial by jury? Who ever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one. And I do not believe that there is any new light now to be thrown upon the history of the proceedings of this Government in relation to that matter. When new territory has been acquired it has always been subject to the laws of Congress, to such laws as Congress thought proper to pass for its immediate government, for its government during its Territorial existence, during the preparatory state in which it was to remain until it was ready to come into the Union as one of the family of States."

All this was sound constitutional law, or, rather, was veracious history, showing that Congress governed as it pleased in the Territories independently of the Constitution, and often contrary to it, and consequently that the Constitution did not extend to it. Mr. Webster then showed the puerility of the idea that the Constitution went over the Territories because they were "*land*" and exposed the fallacy of the supposition that the Constitution, even if extended to a Territory, could operate there of itself and without a law of Congress made under it. This fallacy was exposed by showing that Mr. Calhoun, in quoting the Constitution as the supreme law of the land, had omitted the essential words which were part of the same clause and which couple with that supremacy the laws of Congress made in pursuance of the Constitution. Thus:

"The honorable Senator from South Carolina argues that the Constitution declares itself to be the law of the land, and that therefore it must extend over the Territories. 'The land,' I take it, means the land over which the Constitution is established, or, in other words, it means the States united under the Constitution. But does not the gentleman see at once that the argument would prove a great deal too much? The Constitution no more says that the Constitution itself shall be the supreme law of the land than it says that the laws of Congress shall be the supreme law of the land. It declares that the Constitution and the laws of Congress passed under it shall be the supreme law of the land."

The question took a regular slavery turn, Mr. Calhoun avowing his intent to be to carry slavery into the Territories under the wing of the Constitution, and openly treating as enemies to the South all that opposed it. Having taken the turn of a slavery question, it gave rise to all the dissension of which that subject had become the parent since the year 1835.

\* \* \* \* \*

This attempt, pushed to the verge of breaking up the Government in pursuit of a newly invented slavery dogma, was founded in errors too gross for misapprehension. In the first place, as fully shown by Mr. Webster, the Constitution was not made for Territories, but for States. In the second place, it can not operate anywhere, not even in the States for which it was made, without acts of Congress to enforce it. This is true of the Constitution in every particular. Every part of it is inoperative until put into action by a statute of Congress. The Constitution allows the President a salary; he can not touch a dollar of it without an act of Congress. It allows the

recovery of fugitive slaves; you can not recover one without an act of Congress. And so of every clause it contains. The proposed extension of the Constitution to Territories, with a view to its transportation of slavery along with it, was then futile and nugatory until an act of Congress should be passed to vitalize slavery under it. So that, if the extension had been declared by law, it would have answered no purpose except to widen the field of the slavery agitation, to establish a new point of contention, to give a new phase to the embittered contest, and to alienate more and more from each other the two halves of the Union. But the extension was not declared. Congress did not extend the Constitution to the Territories.

The proposal was rejected in both Houses; and immediately the crowning dogma is invented that the Constitution goes of itself to the Territories without an act of Congress, and executes itself, so far as slavery is concerned, not only without legislative aid, but in defiance of Congress and the people of the Territory. This is the last slavery creed of the Calhoun school and the one on which his disciples now stand—and not with any barren foot. They apply the doctrine to existing Territories and make acquisitions from Mexico for new applications. It is impossible to consider such conduct as anything else than as one of the devices for “*forcing the issue with the North,*” which Mr. Calhoun, in his confidential letter to the members of the Alabama legislature, avows to have been his policy since 1835, and which he avers he would then have effected if the members from the slave States had stood by him.

The “irrepressible conflict” regarding slavery is ended. It is no longer a political issue. Therefore it is as proper as it is necessary to consider the effects of that conflict upon the legislation and judicial determinations of the period in which it was the all-absorbing question. Contemporaneous history is the light by which laws and their judicial interpretations are to be read.

Historically we know that the slaveholding population of the United States and their supporters, relying upon the fact that, ordinarily, emigration moves along the parallels of latitude, confidently expected that the territory acquired by the United States during the war with Mexico would be occupied by a people who believed in slavery. The discovery of gold in California changed the ordinary course of emigration and inundated California with a wave of immigration composed of people from all lands and to whom slavery was a hateful institution.

Then commenced the fierce struggle to secure protection, in this Territory, for the rights of the slaveholders by Congressional enactment; two scenes in which are graphically described by Mr. Benton in language already quoted.

Baffled in the attempt to secure the desired action by Congress at the first session in 1848, the supporters of the “peculiar institution” had recourse to action by the Executive as a branch of the political department of this Government. The action had was taken during the interim between the first and second sessions of the Thirtieth Congress. James K. Polk was President; James Buchanan, Secretary of State; William L. Marcy, Secretary of War; R. J. Walker, Secretary of the Treasury. These are great names in the history of politics and jurisprudence in our country, and when their action is confirmed by the Supreme Court of the United States a prospective critic may well

pause for consideration and deliberation as he adjusts his shaft. But it is well known that these men were the leaders of a great army of partisans, striving to preserve the institution of human slavery, which, from our early history, had been a prolific source of contention and a menace, even in that early day, to the establishment and continued existence of our Government. In 1848 it was the "burning question," with regard to which political lines were drawn, and the heat engendered was so intense as to kindle the flames of war. While these men were great, they were also human, and could no more resist the influences of their political environment than they could alter the existing climatic conditions.

Upon the failure of the Thirtieth Congress (1848-49) at its first session to act in the matter of extending the Constitution and laws of the United States over California, the Executive took the initiative. The treaty of peace with Mexico, which also designated the boundary between Mexico and the United States, was ratified May 30, 1848. Official notice of the treaty was not received by the commander of our forces in California until August 7, 1848. On August 9, 1848, Colonel Mason, then in command in California, proclaimed the treaty and announced that the military government then in charge of the civil affairs of the Territory would continue in authority until other provision was made, but that the tariff for the collection of military duties would immediately cease, and that the revenue laws and tariff of the United States would be substituted in its place, and the change was made. Colonel Mason reported his action to the authorities at Washington and his action was confirmed by them.

The Thirtieth Congress adjourned in August, 1848. In the closing days of that session Congress passed two acts from which it appears, by inevitable intendment, that both Houses of Congress assented to the extension of the boundaries of the United States to include Upper California. The first of these was "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending \* \* \* *and for other purposes*," approved August 12, 1848.

This act provided:

For the expenses of running and marking the boundary line between the United States and Mexico and paying the salaries of the officers of the Commission, a sum not exceeding fifty thousand dollars. (9 Stat. L., chap. 166, p. 301.)

The second act was "An act to establish certain post routes," approved August 14, 1848. Section 3 of this act provided as follows:

SEC. 3. *And be it further enacted*, That the Postmaster-General be, and he is hereby, authorized to establish post-offices and appoint deputy postmasters at San Diego, Monterey, and San Francisco, and such other places on the coast of the Pacific, in California, within the territory of the United States, and to make such temporary arrangements for the transportation of the mail in said territory as the public interest may require; that all letters conveyed to or from any of the above-mentioned places

on the Pacific, from or to any place on the Atlantic coast, shall be charged with forty cents postage; that all letters conveyed from one to any other of the said places on the Pacific shall pay twelve and a half cents postage; and the Postmaster-General is authorized to apply any moneys received on account of postages aforesaid to the payments to be made on the contract for the transportation of the mails in the Pacific Ocean; and the Postmaster-General is further authorized to employ not exceeding two agents in making arrangements for the establishment of post-offices and for the transmission, receipt, and conveyance of letters in Oregon and California, at an annual compensation not exceeding that of the principal clerks in the Post-Office Department.

Approved August 14, 1848. (9 Stat. L., chap. 175, p. 320.)

The position assumed by President Polk and his Cabinet was that by such legislation the stipulations of the agreement between the United States and Mexico, as evidenced by the treaty, had been made operative in the United States and the boundaries of the United States extended to include the territory acquired by conquest confirmed by treaty. See letter of instruction dated October 7, 1848, from James Buchanan to William V. Vorhies, agent of the Government of the United States in establishing post routes and post-offices in California. (House Ex. Doc. No. 17, pp. 6-7, Thirty-first Congress, first session.)

To this much of the conclusion reached by President Polk and his Cabinet no exception need be taken.

It serves to illustrate, however, the necessity for plain provisions and specific utterances by Congress in legislating for the new possessions of the United States. "Necessary intendment" is too flexible and expansive to form a proper test for the grave questions involved.

But President Polk and his Cabinet saw fit to go further. By letter of date October 9, 1848, William L. Marcy, as Secretary of War, instructed Colonel Mason as follows:

But the government *de facto* can of course exercise no powers inconsistent with the provisions of the Constitution of the United States, which is the supreme law of all the States and Territories of our Union. For this reason no import duties can be levied in California on articles the growth, produce, or manufacture of any State or Territory of the United States; and no such duties can be imposed in any part of the Union on the productions of California; nor can duties be charged on such foreign productions as have already paid duties in any part of the United States.

At the same time R. J. Walker, as Secretary of the Treasury, issued the following circular (see Ex. Doc. No. 1, second sess. Thirtieth Cong.):

TREASURY DEPARTMENT, *October 7, 1848.*

On the 30th of May last, upon the exchange of ratifications of our treaty with Mexico, California became a part of the American Union, in consequence of which various questions have been presented by merchants and collectors for the decision of this Department.

By the Constitution of the United States is declared that "*All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land.*" By the treaty with Mexico California is annexed to this Republic, and the Constitution of the United States is extended over that territory, and is in full force throughout its limits. Congress also, by several enactments subsequent to the ratification of the treaty, have distinctly recognized California as a part of the Union, and have extended over it in several important particulars the laws of the United States.

Under these circumstances the following instructions are issued by this Department:

First. All articles of the growth, produce, or manufacture of California shipped therefrom at any time since the 30th of May last are entitled to admission free of duty into all ports of the United States.

Second. All articles of the growth, produce, or manufacture of the United States are entitled to admission free of duty into California, as are also all foreign goods which are exempt from duty by the laws of Congress, or on which goods the duties prescribed by those laws have been paid to any collector of the United States previous to their introduction into California.

Third. Although the Constitution of the United States extends to California, and Congress has recognized it by law as a part of the Union and legislated over it as such, yet it is not brought by law within the limits of any collection district, nor has Congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that territory. Under these circumstances, although this Department may be unable to collect the duties accruing on importations from foreign countries into California, yet if foreign dutiable goods should be introduced there and shipped thence to any port or place of the United States they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without the payment of duties.

R. J. WALKER,  
*Secretary of the Treasury.*

The authorities in California proceeded to act in accordance with these instructions and enforced in that Territory the tariff and navigation laws of the United States as then existing.

Their action was sustained by the Supreme Court of the United States in *Cross et al. v. Harrison* (16 How., 164, 189-190, 197), decided in 1853.

The action of President Polk in this matter might have been justified by reasons seemingly incontestable, if based on the fact that the law which imposed a tariff on foreign goods landed in the Territory was put in force by the military government while the United States was exercising the rights of a belligerent; that subsequent changes in the schedules made by the *de facto* government were changes in regulations for the enforcement of an existing law; that such changes lay within the discretion of the military authorities, and therefore the President, as commander in chief of the military forces and the head of the military government, might adopt the schedules, rules, and regulations of his home Government if his discretion so determined.

But neither President Polk nor the court based the authority on such grounds. Both placed it on the avowal that the Territory was bound and privileged by the Constitution and laws of the United States, *ex proprio vigore*, upon the acquisition becoming complete.

Congress did not take this view of the matter, and at the second session of the Thirtieth Congress passed "An act to extend the revenue laws of the United States over the Territory and waters of Upper California, and to create a collection district therein," approved March 3, 1849 (9 Stat., chap. 112, p. 400).

That the course pursued by Mr. Polk and his Cabinet, although sustained by the Supreme Court of the United States, was at variance

with the ideas entertained by the founders of the Republic plainly appears when compared with the action taken by the First Congress in the instances of North Carolina and Rhode Island. The President informed Congress on the 28th of January, 1790, that North Carolina had ratified the Constitution on November 21, 1789; and, again, he informed Congress on the 1st day of June, 1790, that Rhode Island had ratified the Constitution on May 29, 1789. Prior to receiving these notifications Congress had enacted two revenue measures, to wit, "An act for laying duties on goods, wares, and merchandises imported into the United States," also, "An act imposing duties on tonnage." Although by such act of ratification both North Carolina and Rhode Island became incorporated in the Union of States, Congress saw fit to pass acts extending the provisions of the previous revenue measures over the territory included in North Carolina and Rhode Island. (See 1 Stat., pp. 99; 126.)

Louisiana was ceded to the United States in 1803. The Territory of Orleans was erected in a portion thereof in 1804, and in 1812 was admitted into the Union of States as the State of Louisiana. At the time of the cession the tariff law of the United States authorized a reduction of 25 per cent of the rates fixed by the schedules on goods imported in American bottoms. The treaty with France gave a similar reduction to the French and Spanish vessels entering the harbor of New Orleans, thereby giving the French and Spanish imports at that city a lower duty than was imposed elsewhere in the United States. For eight years the Territory of Orleans had an essentially different tariff system from that of any other portion of the United States.

The claims of the United States to Florida were confirmed by Spain in the treaty of 1819. After we had taken possession the laws regulating the importation of foreign goods into the United States were enforced against the imports from Florida until Congress made our laws operative therein. Commenting upon these and other instances, the Supreme Court of the United States say (*Fleming v. Page*, 9 How., pp. 616, 617):

The Treasury Department in no instance that we are aware of since the establishment of the Government has ever recognized a place in a newly acquired country as a domestic port, unless it had been previously made so by act of Congress.

In 1856 came the *Dred Scott* decision, which has already been reviewed. But that case takes on an added interest at this point of the investigation, because it is the one case in our history where an appeal was taken from the Supreme Court to the sovereign people. The opponents of slavery availed themselves of an "appeal to Caesar," and their adversary followed the case into the tribunal wherein the sovereign people register decrees.

Two new expounders of the Constitution appeared—Stephen A. Douglas and Abraham Lincoln. A new doctrine was enunciated as

pertaining to the controversy, and a new theorem was declared. Douglas announced the doctrine of "squatter sovereignty," which, in short, was the inherent right of the inhabitants of the Territories to govern themselves and to pass upon their domestic institutions, among which was slavery.

Lincoln announced the theorem, "A house divided against itself can not stand." "This nation will be all slave or all free."

In 1860 the approach of a Presidential election found that diverse views regarding the doctrine that the Constitution was in force in the Territories, *ex proprio rigore*, had divided the people into three great camps.

These views found expression in the national platforms adopted by three conventions. The Democratic convention which nominated Douglas declared:

Inasmuch as differences of opinion exist in the Democratic party as to the nature and extent of the powers of a Territorial legislature, and as to the powers and duties of Congress, under the Constitution of the United States, over the institution of slavery within the Territories;

*Resolved*, That the Democratic party will abide by the decisions of the Supreme Court of the United States on the questions of constitutional law.

Douglas was the embodiment of the doctrine of squatter sovereignty, and his platform was constructed so as to enable the Democrats who rejected that doctrine to support him in the election, and remit the question of the soundness of the doctrine to the Supreme Court.

The Democratic convention which nominated Breckinridge, declared:

1. That the government of a Territory organized by an act of Congress is provisional and temporary, and during its existence all citizens of the United States have an equal right to settle with their property in the Territory without their rights, either of person or property, being destroyed or impaired by Congressional or Territorial legislation.

2. That it is the duty of the Federal Government, in all its departments, to protect, when necessary, the rights of persons and property in the Territories and wherever else its constitutional authority extends.

The Republican convention nominated Lincoln and declared:

*That the new dogma, that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country.*

Upon the issues as joined the sovereign people pronounced decree by electing 180 Lincoln electors out of 303 votes in the electoral college and a Republican majority in both the Senate and the House.

The popular vote stood:

Total for the doctrine (Douglas and Breckinridge).....	2, 223, 068
Total against the doctrine (Lincoln and Bell) .....	2, 457, 813
Majority of those opposing.....	234, 475

It is doing a grave injustice to the 1,374,664 supporters of Mr. Douglas to class them all as accepting the doctrine announced in the platform on which Breckinridge was nominated. The delegates who nominated Douglas refused to adopt the views expressed in the Breckinridge platform, and permitted the convention to split in two, rather than subscribe to such a doctrine.

That many persons voted for Douglas in hopes that the plan outlined in his platform would avoid a threatened war is also well known, and the course pursued by the Douglas Democrats when the war came would justify transferring a large majority, if not all, of these votes to the total of "those opposed."

Being defeated in the forum of the people the adherents of this doctrine resorted to rebellion. The discussion was silenced by the clash of arms; the Constitution read anew by the glare of battles. The doctrine and the peculiar institution it was intended and calculated to protect, maintain, and extend was trampled under by the iron hoofs of war. Lincoln's theorem was exemplified. The house did not fall, but it became "all free."

It is to be noted that the advocates of the doctrine that the Constitution of its own force extends over the Territories, supported their contention by declaring that the fundamental principle of protection to property and equality of privileges and immunities, guaranteed by the Constitution, was involved. That the property was slaves was a mere incident. The doctrine is not to be tested by incidentals. If it is correct in principle, it was not false as to the incident of slavery.

The war ended; the armies disbanded; the soldiers returned home to engage in the pursuits of peace; but they found their places in the business world occupied by others. In most instances the soldiers were without capital, and, having become accustomed to the turmoil of the camp, were little disposed to settle down to the quiet life of town and country. The spirit of the adventurous life they had been living had not died out. At this time the great West was being opened; the Pacific railroads and connecting lines were being constructed; the mineral wealth of the Rocky Mountains was becoming known. Neither capital nor business standing was essential to success. The alluring prospect was not to be resisted, and thousands of the soldiers of the war "went west," and their friends with them. The nation opened its gates and invited the world to partake of its bounty. "Uncle Sam is rich enough to give us all a farm" was the cry the world around. Thereupon the new West was the objective point of a world exodus. The vast foreign element was easily and rapidly assimilated by the nation and eagerly sought for themselves and their children the knowledge necessary and the qualifications required for American citizenship. The former citizens of the Eastern and Middle States were the dominant factor of each community. The new arrivals



from foreign lands were their willing disciples in sociology and governmental polity. All this was very gratifying to the nation.

It was inevitable that communities so constituted and conditioned, engaged in developing territory *within* the acknowledged limits of the United States, should receive all possible assistance from Congress and the other departments of the Government in the great work in which they were engaged. Territorial governments were rapidly created, with powers far in excess of any previously conferred. But the change was in the *practice*, not the *principle*. The Territories were still *created* and the powers *conferred*. The nation continued to govern them by virtue of inherent sovereign right. The doctrine of popular (squatter) sovereignty in the Territories is incompatible with the fundamental conception of the union of States and is thoroughly discredited.

In *Snow v. United States* (18 Wall., 319-320) the court say:

The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government. It is, indeed, the practice of the Government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt.

In *National Bank v. County of Yankton* (101 U. S., 133) the court, speaking by Mr. Chief Justice Waite, say:

All territory within the *jurisdiction* of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the *outlying dominion* of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The *organic law* takes the place of a *constitution* as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has *all the powers of the people of the United States*, except such as have been expressly or by implication reserved in the *prohibitions* of the Constitution. \* \* \* Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what *the people*, under the Constitution of the United States, may do for the States.

The rule herein announced is broad and plain. In legislating for the States Congress exercises only such powers of sovereignty as are conferred upon it by the Constitution. In legislating for the Territories Congress exercises all powers of sovereignty not prohibited by the Constitution.

In *Murphy v. Ramsay* (114 U. S., 44-45) the court say:

But in ordaining government for the Territories and the people who inhabit them all the discretion which belongs to legislative power is vested in Congress, and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular Territory and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people resident in the Territory shall participate in the election of its officers or the making of its laws, and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the Government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.

In *United States, Lyon, et al. v. Huckabee* (16 Wall., 414, 434) the court say:

All captures in war vest primarily in the sovereign, but in respect to real property Chancellor Kent says the acquisition by the conqueror is not fully consummated until confirmed by a treaty of peace or by the entire submission or destruction of the State to which it belonged, which latter rule controls the question in the case before the court, as, the confederation having been utterly destroyed, no treaty of peace was or could be made, as a treaty requires at least two contracting parties. Power to acquire territory, either by conquest or treaty, is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent and the title vests absolutely in the conqueror. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or State. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered State, including even debts as well as personal and real property.

In *Talbott v. Silver Bow County* (139 U. S., 446) the court, speaking by Mr. Justice Brewer, with reference to a Territory, say:

It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, *all* whose powers are *created* by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the General Government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization.

If *all* the powers are *created by Congress* then *none* is derived from the Constitution. None springs from the inherent rights of individuals or communities.

In *Shively v. Bowlby* (152 U. S., 48) the court, speaking by Mr. Justice Gray, say:

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition.

The legislature of a State, in legislating for the municipalities situated in the State and the inhabitants thereof, exercises all the powers of sovereignty belonging to the State the exercise of which is not prohibited by the State constitution. Thereby the "inherent rights of man" during our entire history have been exposed to the peril of the unrestricted discretion of State legislatures in the same way as these rights in the Territories are exposed to the discretion of Congress. Possessing this broad discretion, it is certainly safe to say of Congress that in legislating for "territory within the jurisdiction of the United States not included in any State," constituting "the outlying dominion of the United States" (101 U. S., p. 133)—

It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. (*Endleman v. United States*, 86 Fed. Rep., 459.)

Is a different rule to be applied to the territory acquired by a conquest made necessary by the emergencies of the war with Spain, and to the varied races inhabiting it, than is applied to territory constituting an integral part of our domain when the nation was founded? Are the inhabitants of the islands, sovereignty in which was ceded by Spain in 1898, after complete conquest, entitled to rights and privileges, immunities and benefits denied to soldiers of the Republic who live in Oklahoma?

The sovereign power of Congress in governing territory subject to the jurisdiction of the United States, but outside of the limits of the several States, has been discussed by the Supreme Court in a number of cases involving the right of Congress to establish courts, confer jurisdiction thereon, and regulate procedure therein.

In various ways these Territorial courts have been assailed, the contention being that in their creation Congress exercised the power conferred by Article III, section 1, of the Constitution, and in the exercise of said power Congress was subject to the limitations and restrictions provided in the Constitution.

In *Benner v. Porter* (9 How., 235, 242) the court say:

The distinction between the Federal and State jurisdictions under the Constitution of the United States has no foundation in these Territorial governments, and consequently no such distinction exists either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.

They are not organized under the Constitution nor subject to its complex distribution of the powers of government, as the organic law, but are the creations exclusively of the legislative department, and subject to its supervision and control.

The United States Supreme Court has always adhered to this doctrine. (*American Ins. Co. v. Canter*, 1 Pet., 511, 546; *Clinton v. Englebrecht*, 13 Wall., 434, 447; *Hornbuckle v. Toombs*, 18 Wall., 648, 655; *Good v. Martin*, 95 U. S., 90, 98; *Reynolds v. United States*, 98 U. S., 145, 154; *McAllister v. United States*, 141 U. S., 174, 180.)

The question has also been presented to the Supreme Court by cases involving the right to trial by jury.

Trial by jury, in the abstract, is not a right, but a means of securing a right. The right involved is justice.

Justice is an inherent, inalienable right of man, which no sovereign may properly refuse. Trial by jury is one of the fixed institutions of the common law, and where the common law prevails, this procedure may be said to attain the dignity of a right. That is to say, it is so ingrafted on the common law as to be an essential part thereof. But this is not true of the *civil law*. The common law belongs to the Anglo-Saxon race. It is the creature of their civilization. Centuries of adherence and devotion to its teachings has given it the character of righteousness, if not of right.

The guaranty of trial by jury dates back to Magna Charta, and, with an Anglo-Saxon, no right need seek other source for its vindication. But the Latin races can assert no such title. Whence their claim to the rights secured on Runnymede and guaranteed by Magna Charta? Their adherence and devotion has been given to the civil law. If the manifest result of attempting to administer justice by jury trials would be to defeat the purpose and deny the right of justice, is the sovereignty which is bound to sustain the right to justice bound to rely on trial by jury? Must the substance be sacrificed to preserve the shadow?

The common law did not attach to the territory acquired by the United States in the late war, upon the act of acquisition. The civil law continued in force, as it did for a time in the territory acquired by the Louisiana purchase, and in a portion of which territory it remains in force to-day in modified form. If the rules of the common law are to become of force in territory acquired by the United States, in which territory the civil law had prevailed prior to the acquisition, the change must be accomplished by Congress or governmental agencies authorized by Congress to take such action. (See authorities hereinbefore cited.)

In *Thompson v. Utah* (170 U. S., 343, 346), the court, speaking by Mr. Justice Harlan, say:

That the provisions of the Constitution of the United States relating to the right of trial by jury in the suits at common law apply to the Territories of the United States is no longer an open question. *Webster v. Reid*, 11 How., 460; *American Publishing Co. v. Fisher*, 166 U. S., 464, 468; *Springville v. Thomas*, 166 U. S., 707.)

In view of the provisions of section 1891, Revised Statutes of the United States, and the special acts of Congress, hereinbefore referred to, whereby the Constitution and laws of the United States not locally

inapplicable are extended to the Territories, the declaration quoted is incontestable.

The case of *Webster v. Reid* (11 How., 437, 460), decided in 1850, arose in the Territory of Iowa. The court, speaking by Mr. Justice McLean, say (p. 460):

The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787 over the Territory, so far as they are applicable.

The act of the Territorial legislature involved in *Webster v. Reid* prohibited trial by jury in matters of fact involved in cases of a certain character. For the reason set forth in the above quotation, the court held, as to the act of the Territorial legislature, that—

In this respect the act is void (p. 460).

*Reynolds v. United States* (98 U. S., 145), was a criminal action arising in Utah Territory. In that case the court say (p. 154):

By the Constitution of the United States (Amend. VI), the accused was entitled to a trial by an impartial jury.

This case was decided in 1878. The act to establish a Territorial government for Utah September 9, 1850, chapter 51, section 17, 9 Stat., 458, provided—

that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah so far as the same or any provision thereof may be applicable.

A subsequent statute made specific provision for trials by jury in the Territories. (Act of April 7, 1874, chapter 80, 18 Stat., 27.) Section 1 of said act closes with this proviso:

*Provided*, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

The case of *American Publishing Co. v. Fisher* (166 U. S., 464), decided in 1896, was a common-law action originating in the Territory of Utah. The court held that litigants in common-law actions in the courts of that Territory had a right to trial by jury.

Mr. Justice Brewer, in delivering the opinion of the court, says (p. 466):

Whether the seventh amendment to the Constitution of the United States, which provides that "in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved," operates *ex proprio vigore* to invalidate this statute may be a matter of dispute.

He then reviews the decisions and the acts of Congress of 1850 (9 Stat., 458) and 1874 (18 Stat., 27), above referred to, and determines the case as follows (pp. 467-468):

Therefore either the seventh amendment to the Constitution or these acts of Congress, or all together, secured to every litigant in a common-law action in the courts of the Territory of Utah the right to a trial by jury.

The court further held that the seventh amendment required unanimity in finding a verdict as an essential feature of trial by jury in common-law cases.

The rule so announced was adhered to in *Springville v. Thomas* (166 U. S., 707, 708).

The case of *Callan v. Wilson* (127 U. S., 540) involved the right of trial by jury in a criminal proceeding had in the District of Columbia.

In delivering the opinion of the court, Mr. Justice Harlan says (p. 547):

It is contended by the appellant that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine and to order him to be imprisoned until such fine was paid. This *precise question* is now, for the first time, presented for determination by this court.

\* \* \* \* \*

The contention of the Government is that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia.

\* \* \*

Regarding the position taken by the Government, Mr. Justice Harlan, continuing, says (pp. 548, 549):

Upon a careful examination of this position we are of opinion that it can not be sustained without violence to the letter and spirit of the Constitution.

The learned justice then discusses the use of the words "crime" and "criminal prosecutions" in the Constitution and amendments, and the provisions regarding trial by jury, and arrives at the conclusion that the provisions regarding trials by jury were inserted for the purpose, as stated by him (pp. 549, 550)—

to have been the supreme law of the land, and, so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property.

Conceding this to be true, is such right of a higher character than the right of representation in the body empowered to impose taxation?

Is not "trial by jury" a method of procedure in courts established and maintained for the purpose of securing the due administration of justice?

We have seen that the Supreme Court have always adhered to the doctrine that Congress in establishing courts in the Territories and conferring jurisdiction thereon was not bound by the provisions of the Constitution regarding the judicial powers of the United States. Is Congress bound by the provisions regarding procedure and free as to the character and jurisdiction of such courts?

Continuing, Mr. Justice Harlan says (p. 550):

There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property, especially of the privilege of trial by jury in criminal cases. In the draft of a constitution reported by the Committee of Five on the 6th of August, 1787, in the con-

vention which framed the Constitution, the fourth section of Article XI read that "the trial of all criminal offenses (except in cases of impeachment) shall be in the States where they shall be committed, and shall be by jury." (1 Elliott's Deb., 2d ed., 229.) But that article was, by unanimous vote, amended so as to read: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct." (Id., 270.) The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offenses committed out of any State." (3 Madison Papers, 1441.)

But does not Mr. Madison refer to *trials had within a State* of offenses committed without the State? That the convention considered the provision as applying to trials within States of offenses so committed seems apparent from the proceedings had with reference thereto, set forth in 3 Madison Papers, 1589, as follows:

Article 2, section 2 (the third paragraph). Mr. Pinckney and Mr. Gerry moved to annex to the end, "and a trial by jury shall be preserved as usual in civil cases."

Mr. GORHAM. The constitution of juries is different in different States, and the trial itself is *usual* in different cases in different States.

Mr. King urged the same objections.

General Pinckney also. He thought such a clause in the Constitution would be pregnant with embarrassments.

The motion was disagreed to *nem. con.*

Continuing, the opinion states:

In *Reynolds v. United States* (98 U. S., 145, 154) it was taken for granted that the sixth amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster v. Reid* (11 How., 437, 460) that the seventh amendment secured to them a like right in civil actions at common law. We can not think that the people of this District have, in that regard, less rights than those accorded the people of the Territories of the United States.

The act of February 21, 1871, establishing a government for the District of Columbia, provided as follows:

Section 34. \* \* \* And the Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States. (16 Stat., 426, chap. 62, sec. 34.)

The right of trial by jury, however high its character, is an acquired right, not an inherent one, such as life and liberty. If it is acquired by and through the Constitution, it can not be acquired where the Constitution is not in force. If the right of trial by jury in the Territories is derived from the Constitution, the right was in abeyance until Congress extended the Constitution over the Territory. (See authorities hereinbefore referred to.) Would not a like rule apply in the instance of the District of Columbia?

If the right of trial by jury is one of the inherent rights of man, it would seem that one of the States in the Union could not properly deprive him of it, and if such deprivation was attempted the General

Government would protect a national citizen in the assertion of such right. The Supreme Court of the United States has expressly held:

A trial by jury in suits at common law pending in the State courts is not a privilege of immunity of national citizenship which the States are forbidden by the fourteenth amendment of the Constitution of the United States to abridge. (*Walker v. Sauvinet*, 92 U. S., 90.)

And in criminal cases the holding of that court has been:

The fifth and sixth amendments to the Constitution of the United States (relating to criminal prosecutions) were not designed as limits upon State governments. (*Twitchell v. Commonwealth*, 7 Wall., 321; *Barron v. The City of Baltimore*, 7 Pet., 243; *Fox v. Ohio*, 5 How., 434; *Smith v. Maryland*, 18 How., 71, 76; *Withers v. Buckley*, 20 How., 90.)

In these cases the court hold that the limitations of the Constitution apply to Federal courts only. As has already been shown, the Supreme Court of the United States sustain the doctrine that courts created in Territories are not Federal courts, although created by Congress or by virtue of authority conferred by Congress, and are free from the restrictions and limitations of the Constitution. By parity of reasoning, a like rule would be applied to courts established by Congress in our newly acquired island possessions.

If the right of trial by jury was acquired from a source antedating the Constitution, running through all the history of the Anglo-Saxon race, recognized, but not created, by Magna Charta, part and parcel of our civilization and racial inheritance, a different question is presented, for the right then becomes one guaranteed by laws higher than the Constitution, and the right to claim such right is to be determined by the same higher laws. Tested by the requirements of these higher laws, the rights of the citizens of the District of Columbia are as far removed from those of the varied races in the Philippines as are the degrees of longitude marking their geographical locations.

#### IV.

##### THE CONSENT OF THE GOVERNED.

All powers of all governments rest upon the allegiance of the people over whom the government is instituted. Without allegiance there can be no government. Allegiance must not be confounded with citizenship. Allegiance lies back of citizenship. The theory of our form of government is, that allegiance is created by the consent of the individual; while citizenship is created by the consent of the sovereignty. That is to say, allegiance originates with man, citizenship with the government.

The word "allegiance" is derived from the Latin *alligare*, to bind to, and means the tie which binds the individual to the government.

Acquired allegiance is that binding upon a person who was born an alien but has been naturalized.



Local or actual allegiance is that which is due from an alien while resident in a country in return for the protection afforded by the government.

Natural allegiance is that which results from the birth of a person within the territory and of a sire acknowledging allegiance to the government. (Kent's Com., vol. 2, 42.)

Allegiance may be an absolute and permanent obligation or it may be a qualified and temporary one. The citizen owes the former to his government until by some act he distinctly renounces it, while the alien domiciled in the country owes a temporary allegiance continuing during such residence. (*Carlisle v. United States*, 16 Wall., 147, 154.)

Under the feudal law the theory prevailed that a person was bound to give allegiance to the overlord on whose estate he was born, and through his overlord to the king, and through the king to God. This was predicated on the theory that kings ruled by divine right, and that through him such right descended to the overlord. Therefore such allegiance was a duty imposed by the fact of birth, was as binding as allegiance to God, and could not be avoided except with the consent of the overlord and the king. From this arose the system of vassalage under which men were believed to be attached to the soil on which had occurred the accident of their birth. At the time the leaven of independence was fermenting the spirit of revolution in the American colonies this fundamental dogma of the feudal law was an accepted doctrine. The Tories advanced it in opposition to the arguments for independence. The advocates of independence for the colonies met this appeal by a direct challenge of the divine right of kings to command allegiance, and thereby secure the power to rule or govern. They insisted that a man had the right to dispose of his allegiance as he saw fit. If a man wanted to openly or impliedly acknowledge allegiance to the King of Great Britain he could do so, and if he saw fit to transfer his allegiance, with its attendant power, to another sovereignty, he could do so without securing the permission of his then sovereign.

The fundamental idea of the Declaration of Independence is a denial of the divine right of kings to rule; that is, that kings derive their claims to the allegiance of the governed from God. Hence the declaration that governments derive their just powers "from the consent of the governed." This was a startling doctrine in those days. So deeply rooted was the idea that kings ruled by divine right that it was not to be overturned by the mere declaration of a contrary doctrine, however true. The new doctrine was not universally accepted, even in the colonies. Therefore, to secure the adherence of those who rejected it and the acquiescence of other nations by whom recognition was desired, the Declaration of Independence entered into an elaborate defense of the proposed change of allegiance by setting forth the many acts of wrongdoing by which the transfer of allegiance

was justified upon the ground that the King of Great Britain had forfeited his divine right, if such right ever existed, and that by reason of said forfeiture the people of the colonies

are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

The derivation of powers from the consent of the governed proclaimed in the Declaration of Independence refers to that storehouse of all the powers of all governments—the allegiance of the people constituting the body politic. The declaration that this allegiance must be conferred by the consent of the governed and could not be required by divine right was a direct blow at the foundation stone of the feudal system and the corner stone of all governments then existing.

Attention is directed to the fact that the Declaration sets forth that it is “the just *powers*” which are derived. The Declaration did not mean when uttered, and does not mean now, that after said powers are acquired their subsequent exercise in the matter of enforcing laws created pursuant to said powers should be regulated by the caprices of the “governed”—as, for example, that judgment in a criminal action can only be entered by the consent of the accused.

The existence of this distinction enabled the Government of the United States to deny the right of rebellion.

The successful conduct of the Revolution established in our country the principle that the right to transfer his allegiance without the consent of his sovereign is one of the inherent rights of man. But when the founders of this nation came to exercise this right the ideas of the feudal system were so ingrafted in the minds of the people that involuntarily, no doubt, the general plan of the system was preserved, although modified to conform to the vital principle of the new doctrine. A sovereign State was substituted for the over-lord as the primary recipient of the allegiance and a confederation of States for the king. The General Government or confederation of States was, however, more like an elector than a king. The central idea of the confederation was that allegiance was given and was thereafter due to the individual States, and the General Government must look to the States for the allegiance of the people. As citizenship is based on allegiance, it followed that to the States belonged the authority to confer citizenship. When the Constitution was adopted and this Government established, this idea that the allegiance of the people was primarily due to the State was not eliminated. In the course of time it proved a bitter heritage. The idea that a man's allegiance was due to the State from which he derived his citizenship was the shibboleth of the rebellion which plunged this nation in civil war.

Brought to a realizing sense of the dangers of this doctrine and the conditions and institutions constructed thereon, the nation changed the rule by the adoption of the fourteenth and fifteenth amendments

to the Constitution, the purpose and effect of which are to confer allegiance upon the General Government and enable the General Government to reciprocally confer citizenship.

The doctrine that a man could transfer his allegiance without the consent of his sovereign being accepted by the United States, our Government proceeded to enact naturalization laws in harmony with said doctrine, and asserted the correlative right to accept the transfer of allegiance without the consent of the previous sovereign. The nations of Europe, founded upon the feudal system, rejected the doctrine and denied the right of the United States to enforce and practice it, and continued to assert sovereign powers over prior subjects who had made such transfer. This led to the war between the United States and Great Britain in 1812. The continued adherence to this doctrine has involved the United States in almost ceaseless diplomatic correspondence with foreign nations.

The statute 3, Jac. 1, chap. 4, provided that promising obedience to any other prince, State, or potentate, subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason.

In respect to the naturalization law of the United States, passed in 1795, Lord Grenville wrote to our minister, Rufus King:

No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part. (2 Am. State Pap., p. 149; *Fitch v. Weber*, 6 Hare, p. 51.)

The right of expatriation was the subject of an elaborate opinion by Attorney-General Cushing in 1856. Therein he said:

The doctrine of absolute and perpetual allegiance, the root of the denial of any right of emigration, is inadmissible in the United States. It was a matter involved in and settled for us by the Revolution, which founded the American Union. (8 Op. Atty. Gen., p. 139; 9 Op. Atty. Gen., p. 356; Atty. Gen. Black.)

The right of expatriation was declared by Congress to be a natural and inherent one, in this country, by act of July 27, 1868. (15 Stat., 223, chap. 249; secs. 1999, 2000, Rev. Stats.)

While the Government of the United States is thus firmly committed to the doctrine that its powers resting on allegiance are derived from the consent of the governed, it does not require that such consent shall be evidenced by individual declaration, excepting when it decides to confer citizenship by naturalization proceedings. Ordinarily the consent to allegiance is presumed from the fact of residence in the country and participation in the protection and other benefits of organized government. This rule is applied to the native-born inhabitants as well as the inhabitants of newly acquired territory. In regard to this rule Halleck's International Law says (vol. 2, sec. 7, p. 475, 3d ed.):

The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become, or not to become, its subjects. Their obligations to the former government are canceled, and they may, or may not, become the subjects of the new government, according to their own choice. If they remain

in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new State, and is not unjust toward those who determine not to become its subjects. According to this rule, *domicile*, as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided.

Turning to the treaty of peace with Spain (1898), we find that Article IX provides as follows:

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the Territories hereby ceded to the United States shall be determined by Congress.

Clearly, by this stipulation, the United States not only recognized but guaranteed to their full extent the rights embraced in the broad term "the consent of the governed."

If in time to come a resident of said territory desires to withdraw his allegiance and bestow it elsewhere, the United States accords him the liberty, requiring only that if he remains within its jurisdiction he shall consent to the due observance and administration of the laws of the land.

This would be the rule in Arcadia and will probably not be superseded by the millennium.

#### CITIZENSHIP.

Citizenship is not a necessary resultant of an acknowledgment of allegiance. Citizenship is not a price paid by the United States for the allegiance of men. The correlative of allegiance is protection. (*Carlisle v. United States*, 16 Wall., 147, 154.) There are many persons within the jurisdiction of the United States from whom allegiance in some form is due who are not citizens of the United States. Many soldiers in our Army, sailors in our Navy, seamen in our merchant marine, travelers, temporary sojourners, Indians, Chinese, convicted criminals, and, in another and limited sense, minors and women belong to this class.

The celebrated case of *Martin Koszta* illustrates the obligations of the United States Government upon accepting a proffer of allegiance from an alien. *Koszta* came to the United States and took out his

"first papers" under the then existing naturalization laws. These papers contained a declaration of intention to become a citizen of the United States and constituted, in effect, a renouncement of his former allegiance and an acknowledgment of allegiance to the Government of the United States. While in Smyrna, Koszta was seized and placed in confinement by order of an Austrian official. The subsequent proceedings are described by Mr. Justice Miller as follows:

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place and carried on board the *Hussar*, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war *St. Louis*, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul, subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülseman, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. (In re Neagle, 135 U. S., 64.)

Citizenship under our Government is not a right inherent to all men. If it is, then by what right is it denied to any person applying therefor? Why do we prescribe qualifications for naturalization and deny the privilege to Indians and Mongolians?

Citizenship is conferred by the Government. It carries with it great powers, rights, privileges, and immunities. Therefore the Government exercises its discretion in bestowing it. A man can not confer it upon himself of his own volition or by his act of acknowledging allegiance to this Government. There are but two ways of acquiring citizenship in the United States:

1. Compliance with the naturalization laws.
2. Birth within the territory and allegiance of the United States.

In *Elk v. Wilkins* (112 U. S., 94, 101-102) the court, with reference to the fourteenth amendment, say:

This section contemplates two sources of citizenship, and two sources only: Birth and naturalization. The persons declared to be citizens are "all persons born or naturalized in the United States and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth can not become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

The treaty with Spain (Paris, 1898) did not attempt to naturalize the inhabitants of the islands acquired by the United States. On the contrary, it provided that the civil rights and political *status* of the inhabitants shall be determined by the Congress (article 9).

It follows that they can become citizens only by a specific act of Congress.

Attention is directed to the fact that the pending bill for Hawaii contains provisions regulating the naturalization of the inhabitants of said islands.

#### THE RIGHT OF UNRESTRICTED ENTRY INTO THE UNITED STATES.

The inhabitants of the islands acquired by the United States during the late war with Spain, not being citizens of the United States, do not possess the right of free entry into the United States. That right is appurtenant to citizenship. The rights of immigration into the United States by the inhabitants of said islands are no more than those of aliens of the same race coming from foreign lands. The Chinese resident therein will be absolutely excluded under the provisions of the Chinese-exclusion acts. (The Chinese Exclusion case, 130 U. S., 581.)

The Malays as well as the Chinese or Mongolians may be debarred.

Certainly, so long as the political department of this Government elect to treat said islands as being outside the territorial boundaries of the United States, the question of excluding objectionable persons or races is of easy solution. The laws of the United States regulating commerce with that Territory have not been altered. Congress has not changed them, and certainly the Executive acting alone can not do so and has not made the attempt to perform such unauthorized function.

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The doctrine discussed in the foregoing report—that Congress in legislating for territory outside of the boundaries of the several States of the Union is not bound by the limitations imposed by the Constitution—was approved by the Secretary of War and adopted by the several branches of the executive department, and received the sanction of the legislative department by the enactment of the Foraker Act providing a civil government for Porto Rico (31 Stat. L., 77), which act was approved by the President and sustained by the Supreme Court of the United States in the insular cases (182 U. S. 1-498). The doctrine was elaborately discussed during the second session of the Fifty-sixth Congress (Cong. Record, 2d sess. 56th Cong.), and became a political issue in the Presidential campaign of 1900. The Republican party declared for the correctness of the doctrine; the Democratic, and People's Independent parties declared in opposition thereto. At the ensuing election the Republicans secured a majority of the popular vote and elected a majority in the Electoral College and in Congress.

**INCIDENTS IN THE HISTORY OF THE UNITED STATES INVOLVING THE DOCTRINE THAT THE CONSTITUTION AND LAWS OF THE UNITED STATES EXTEND, EX PROPRIO VIGORE, OVER NEWLY ACQUIRED TERRITORY UPON THE ACQUISITION BEING COMPLETED.**

[Submitted September 20, 1900.]

SIR: On February 12, 1900, I submitted for your consideration a report on the status of the insular possessions of the United States, containing a review of the treatment accorded by the judicial branch of this Government to the doctrine of extension of the Constitution and laws of the United States, *ex proprio vigore*, over newly acquired territory upon the acquisition being completed.

In further compliance with your request I have the honor to submit a supplemental report respecting the treatment heretofore accorded said doctrine by the legislative and administrative branches of the Government of the United States, as shown by certain important incidents of our national history.

While it must be admitted that legislative precedent, departmental practice, or Executive action are without the binding force of judicial determination, yet the United States Supreme Court admonishes us as follows:

The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention that framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive. (Burrow-Giles Lith. Co. v. Saroney, 111 U. S., 53, 57.)

The practical construction of the Constitution, as given by so many acts of Congress and embracing almost the entire period of our national existence, should not be overruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land. (Field v. Clark, 143 U. S., 649, 691, and authorities there cited.)

The first incident to which attention is directed is that presented by the debates in Congress ensuing upon the Louisiana purchase treaty being communicated to that body, which incident may be termed very appropriately, "The charge of imperialism preferred against Thomas Jefferson."

This charge was preferred against Jefferson by the opponents of his course in acquiring Louisiana and was pressed with equal vehemence by members of his own party and his political opponents.

The antiexpansionists of those days were certain that the course pursued by Jefferson, Madison, and Monroe in securing Louisiana had violated the Constitution, perverted the principles on which this Government is founded, destroyed the rights of man, and imperiled the continued existence of the Republic. They exhibited quite as much alarm as do the antiexpansionists of to-day.

The cry of imperialism raised against Jefferson was based upon the charge that by the treaty of purchase he had attempted to incorporate Louisiana into the United States and to confer upon Louisiana and its inhabitants, without the aid and consent of Congress, the rights, privileges, and benefits created and guaranteed by the Constitution.

In those days everybody conceded that the President and Senate could not incorporate foreign territory into the United States by an exercise of the treaty-making power any more than he could transfer one of the States to a foreign power by agreeing to a treaty containing such stipulation.

Neither could the President and Senate confer upon individuals the right to participate in this Government and exercise the powers of citizenship.

It was universally held that if these things could be done at all they must be accomplished by legislation; that the legislative powers must be invoked, and the House of Representatives and the Senate must exercise their legislative functions in regard thereto. That the President, acting with the advice of the Senate, and exercising only the authority to make treaties, should be able to accomplish this result, was declared to be absurd and a usurpation of authority possessed by kings and kings' councils, but not vested in the President and Senate of the United States.

The treaty for the purchase of Louisiana was assailed as an act of imperialism because it did not contain the reservations found in the late treaty of peace with Spain, and the Jefferson Administration was assailed as imperialistic because it was alleged to have attempted to do what the McKinley Administration refused to do.

Jefferson repelled the charge by showing that he was pursuing the course which was subsequently followed by the McKinley Administration.

In Jefferson's day the charge of imperialism was one to conjure with. Jefferson had used it against his opponents and did not relish its application to himself.

That Jefferson was an expansionist admits of no denial. His greatest glory was derived from the acquisition of Louisiana and his greatest humiliation resulted from his failure to secure West Florida.

When Jefferson was the American minister at Paris in 1786, he gave expression to his views on the future policy of the United States as to expansion, as follows:

Our confederacy must be viewed as the nest from which all America, North and South, is to be peopled. We should take care, too, not to think it for the interest of that great continent to press too soon on the Spaniards. These countries can not be in better hands. My fear is that they are too feeble to hold them till our population can be sufficiently advanced to gain it from them piece by piece. The navigation of the Mississippi we must have. This is all we are, as yet, ready to receive. (Writings of Jefferson, edited by H. A. Washington, vol. 1, pp. 517-518.)



At no time in our history were the people and public men of our country better informed as to the provisions and purposes of the Constitution and the fundamental principles and theories of our Government than in 1803, when the treaty for the purchase of Louisiana was entered into; for the Constitution had been recently formulated and adopted, and its every line exhaustively discussed throughout the country.

The same is true of our foreign relations. They occupied a larger segment in the public eye than they have in recent years. The earlier Presidents were all selected from men who had secured distinction in the field of diplomacy.

Nor was there in 1803 any lack of information as to the procedure to be followed in conveying the *jus publica* of land to the Federal Government. At the time the Constitution was adopted many of the original thirteen States owned unoccupied lands. Subsequently said lands were ceded to the Federal Government. The cessions were made as follows: New York, 1781; Virginia, 1784; Massachusetts, 1785; Connecticut, 1786; South Carolina, 1787; North Carolina, 1790; Georgia, 1802.

The sovereign State which had been the owner of the territory having consented to the transfer of title, the consent to receive title by the sovereign people of the United States was secured by an act of Congress, passed by the exercise of the sovereign power of legislation vested in Congress by the people, by which act the territory became incorporated into the public domain belonging to the Federal Government. (1 U. S. Stats., chap. 6, pp. 106-109.)

When the Louisiana treaty was received in Washington, Congress was not in session. Fearing complications with Spain, it was contemplated keeping secret the existence of the treaty until Congress should meet in regular session. But fears arose that Napoleon might change his mind regarding the sale, and thereupon the President convened Congress in extraordinary session on October 17, 1803. In his message to Congress, and with reference to the purchase and treaty, Jefferson said:

\* \* \* the property and sovereignty of all Louisiana which has been restored to them [the French] have on certain conditions been transferred to the United States by instruments bearing date the 30th of April last. When these shall have received the constitutional sanction of the Senate, they will without delay be communicated to the Representatives also for the exercise of their functions as to those conditions which are within the powers vested by the Constitution in Congress.

\* \* \* \* \*

With the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; for its incorporation into our Union; for rendering the change of government a blessing to our newly adopted brethren; for securing to them the rights of conscience and of property; for confirming to the Indian inhabitants their occupancy and self-

government, establishing friendly and commercial relations with them, and for ascertaining the geography of the country acquired. (Messages and Papers of the Presidents, vol. 1, p. 358.)

The proposed treaty was on the same day sent to the Senate with a special message addressed to that body simply calling attention to what had been said in the message to both Houses. (Messages and Papers of the Presidents, vol. 1, p. 362.)

The Senate ratified the treaty, and thereafter and on October 21, 1803, President Jefferson sent a message to both Houses of Congress, in which he said:

In my communication to you of the 17th instant I informed you that conventions had been entered into with the Government of France for the cession of Louisiana to the United States. These, with the advice and consent of the Senate, having now been ratified and my ratification exchanged for that of the First Consul of France in due form, they are communicated to you for *consideration in your legislative capacity*. You will observe that some important conditions can not be carried into execution but with the aid of the Legislature, and that time presses a decision on them without delay. The ulterior provisions, also suggested in the same communication, for the occupation and government of the country will call for early attention. (Messages and Papers of the Presidents, vol. 1, pp. 362, 363.)

Randolph, of Virginia, presented the following resolution, which was referred to the Committee of the Whole House:

*Resolved*, That provision ought to be made for carrying into effect the treaty and convention concluded at Paris on the 30th day of April, 1803, between the United States of America and the French Republic. (Annals of Congress, 1803, p. 432.)

The opposition assailed the treaty as being unconstitutional because of the provisions of articles 3 and 7. Article 3 was as follows:

ART. 3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

Mr. G. Griswold, of New York, opened for the opposition by an attack on this article. From the report of his address in the Annals of Congress the following selections are quoted:

Here, then, is a compact between the French Government and that of the United States to admit to citizenship persons out of the jurisdiction of the United States as it now is and to admit territory out of the United States to be incorporated into the Union. He did not find in the Constitution such power vested in the President and Senate. \* \* \* Mr. G. was of opinion that no such power was delegated to any department of the Government; but if such power was delegated to any department, it must be the Legislature. \* \* \*

But if the right of extending our territory be given by the Constitution, its exercise is vested in the legislative branches of the Government. \* \* \* He contended, therefore, that the power to incorporate new territory, \* \* \* if it did exist, belonged to the Legislature and not the Executive, to incorporate it into the Union. If this were the case, *it was the duty of the House to resist the usurped power exercised by the Executive*. (Annals of Congress, 1803, pp. 432-433.)

Mr. Thatcher, of Massachusetts, said:

The confederation under which we now live is a partnership of States, and it is not competent to admit a new partner but with the consent of all the partners. If such power exists, it does not reside in the President and Senate. The Constitution says new States may be admitted by Congress. If this article of the Constitution authorizes the exercise of power under the treaty, *it must reside with the Legislature and not with the President and Senate.* (Annals of Congress, 1803, pp. 454-455.)

Mr. R. Griswold, of Connecticut, said:

It is perhaps somewhat difficult to ascertain the precise effect which it was intended to give the words which have been used in this stipulation. It is, however, clear that it was intended to incorporate the inhabitants of the ceded territory into the Union by the treaty itself, or to pledge the faith of the nation that such an incorporation should take place within a reasonable time. It is proper, therefore, to consider the question with a reference to both constructions.

It is in my opinion scarcely possible for any gentleman on this floor to advance an opinion that the President and Senate may add to the members of the Union by treaty whenever they please—or, in the words of this treaty, may “incorporate in the Union of the United States” a foreign nation who, from interest or ambition, may wish to become a member of our Government. Such a power would be directly repugnant to the original compact between the States, and a violation of the principles on which that compact was formed. It has been already well observed that the Union of the States was formed on the principle of a copartnership, and it would be absurd to suppose that the agents of the parties who have been appointed to execute the business of the compact in behalf of the principals could admit a new partner without the consent of the parties themselves. And yet if the first construction is assumed, such must be the case under this Constitution, and the President and Senate may admit at will any foreign nation into this copartnership without the consent of the States.

The Government of this country is formed by a union of States, and the people have declared that the Constitution was established “to form a more perfect union of the United States.” The United States here mentioned can not be mistaken. They were the States then in existence, and such other new States as should be formed, within the then limits of the Union, conformably to the provisions of the Constitution. Every measure, therefore, which tends to infringe the perfect union of the States herein described is a violation of the first sentiment expressed in the Constitution. The incorporation of a foreign nation into the Union, so far from tending to preserve the Union, is a direct inroad upon it. It destroys the perfect union contemplated between the original parties by interposing an alien and a stranger to share the powers of government with them.

The Government of the United States was not formed for the purpose of distributing its principles and advantages to foreign nations. It was formed with the sole view of securing those blessings to ourselves and our posterity. It follows from these principles that no power can reside in any public functionary to contract any engagement, or to pursue any measure which shall change the union of the States. Nor was it necessary that any restrictive clause should have been inserted in the Constitution to restrain the public agents from exercising these extraordinary powers, because the restriction grows out of the nature of the Government. The President, with the advice of the Senate, has undoubtedly the right to form treaties; but in exercising these powers he can not barter away the Constitution or the rights of particular States. It is easy to conceive that it must have been considered very important by the original parties to the Constitution that the limits of the United States should not be extended. The Government having been formed by a union of

States, it is supposable that the fear of an undue or preponderating influence in certain parts of this Union must have had great weight in the minds of those who might apprehend that such an influence might ultimately injure the interests of the States to which they belonged; and although they might consent to become parties to the Union, as it was then formed, it is highly probably that they would never have consented to such a connection if a new world was to be thrown into the scale to weigh down the influence which they might otherwise possess in the national councils.

From this view of the subject I have been persuaded that the framers of the Constitution never intended that a power should reside in the President and Senate to form a treaty by which a foreign nation and people shall be incorporated into the Union, and that this treaty, so far as it stipulates for such an incorporation, is void.

\* \* \* \* \*

A new territory and new subjects may undoubtedly be obtained by conquest and by purchase; but neither the conquest nor the purchase can incorporate them into the Union. They must remain in the condition of colonies, and be governed accordingly. (Annals of Congress, 1803, pp. 461-462.)

In response to this assault, the supporters of President Jefferson's Administration cheerfully and fully admitted that the President and Senate could not incorporate foreign territory into the United States, nor confer citizenship and the right to participate in the Government of the United States upon the inhabitants of Louisiana; nor could the President and Senate confer the privileges and immunities, the political rights and powers created by the Constitution, upon the territory or its inhabitants. But they insisted that the President and Senate had not attempted to do these things, and the ratification of the treaty did not accomplish them.

Mr. Randolph, of Virginia, replying to Mr. Griswold, of New York, said:

Granting that the United States are not destitute of capacity to acquire territory, he (Griswold) denies that this acquisition has been made in a regular way. Congress, says he, alone is competent to perform such an act. In this transaction he scents at a distance Executive encroachment, and we are called upon to assert our rights and to repel it. If any usurpation of the privileges of Congress or of this House be made to appear I pledge myself to join him in resisting it. But let us inquire into the fact. No gentleman will deny the right of the President to initiate business here by message, recommending particular subjects to our attention. If the Government of the United States possess the constitutional power to acquire territory from foreign states the Executive, as the organ by which we communicate with such states, must be the prime agent in negotiating such an acquisition. Conceding, then, that the power of confirming this act and annexing to the United States the territory thus acquired ultimately rests with Congress, where has been the invasion of the privileges of that body? Does not the President of the United States submit this subject to Congress for their sanction? Does he not recognize the principle, which I trust we will never give up, that no treaty is binding until we pass the laws for executing it; that the powers conferred by the Constitution on Congress can not be modified or abridged by any treaty whatever; that the subjects of which they have cognizance can not be taken in any way out of their jurisdiction? In this procedure nothing is to be seen but a respect on the part of the Executive for our rights—a recognition of a discretion on our part to accord or refuse our sanction. Where, then, is the violation of our rights? As to the initiative in a matter like this, it necessarily devolved on the Executive. (Annals of Congress, 1803, pp. 436-437.)

Mr. Nicholson, of Maryland, replying to Mr. Griswold, of Connecticut, said:

With that gentleman I am unwilling to set the Constitution at defiance. I trust we shall maintain it in all its vigor. The third article of the treaty, he says, either admits the ceded territory into the Union immediately or pledges us to do it hereafter. It can not be contended that the territory is ipso facto admitted, but the objection is that the President and Senate have no right to pledge the Government for anything not immediately within their own powers. This objection is not solid. (Annals of Congress, 1803, p. 469.)

Mr. Mitchell, of New York, replying to his colleague, Mr. G. Griswold, said:

But the gentleman from Connecticut, Mr. Chairman (Mr. Griswold), contends that even if we had a right to purchase soil, we have no business with the inhabitants. His words, however, are very select; for he said, and often repeated it, that the treaty-making power did not extend to the admission of foreign nations into this confederacy. To this it may be replied that the President and Senate have not attempted to admit foreign nations into our confederacy. They have bought a tract of land, out of their regard to the good of our people and their welfare. And this land Congress are called upon to pay for. Unfortunately for the bargain, this region contains civilized and Christian inhabitants; and their existence there, it is alleged, nullifies the treaty.

\* \* \* \* \*

In the case of Louisiana no injury is done, either to the nation or to any State belonging to that great body politic. There was nothing compulsory upon the inhabitants of Louisiana to make them stay and submit to our Government. But if they chose to remain it had been most kindly and wisely provided that until they should be admitted to the rights, advantages, and immunities of citizens of the United States they shall be maintained and protected in the enjoyment of their liberty, property, and the religion which they profess. What would the gentleman propose that we shall do with them? Send them away to the Spanish provinces, or turn them loose in the wilderness? No, sir; it is our purpose to pursue a much more dignified system of measures. It is intended, first, to extend to this newly acquired people the blessings of law and social order. To protect them from rapacity, violence, and anarchy. To make them secure in their lives, limbs, and property, reputation, and civil privileges. To make them safe in the rights of conscience. In this way they are to be trained up in a knowledge of our own laws and institutions. They are thus to serve an apprenticeship to liberty; they are to be taught the lessons of freedom; and by degrees they are to be raised to the enjoyment and practice of independence. All this is to be done as soon as possible; that is, as soon as the nature of the case will permit, and according to the principles of the Federal Constitution. Strange that proceedings declared on the face of them to be constitutional should be inveighed against as violations of the Constitution! Secondly, after they shall have been a sufficient length of time in this probationary condition they shall, as soon as the principles of the Constitution permit, and conformably thereto, be declared citizens of the United States. Congress will judge of the time, manner, and expediency of this. The act we are now about to perform will not confer on them this elevated character. They will thereby gain no admission into this House, nor into the other House of Congress. There will be no alien influence thereby introduced into our councils. By degrees, however, they will pass on from the childhood of republicanism, through the improving period of youth, and arrive at the mature experience of manhood. And then they may be admitted to the full privileges which

their merit and station will entitle them to. At that time a general law of naturalization may be passed. For I do not venture to affirm that, by the mere act of cession, the inhabitants of a ceded country become, of course, citizens of the country to which they are annexed. It seems not to be the case, unless specially provided for. By the third article it is stipulated that the inhabitants of Louisiana shall hereafter be made citizens; ergo, they are not made citizens of the United States by mere operation of treaty:

\* \* \* \* \*

In the treaty respecting Louisiana there is happily no cause for alarm. This power of making citizens has not been exercised by the President and Senate, but at a future day may be used by Congress. (Annals of Congress, 1803, pp. 479, 480, 481.)

In closing the debate Mr. Randolph, of Virginia, is reported as follows:

When he spoke of their acquiring the rights of citizens he did not mean in the full extent in which they were enjoyed by citizens of any one of the particular States, *since they possessed not the right of self-government*, but those rights of personal liberty, of personal security, and of property, which were among the dearest privileges of our citizens. (Annals of Congress, 1803, p. 486.)

In Jefferson's time no one believed that the President and Senate could extend the boundaries of the United States by treaty stipulations, or incorporate foreign territory into the United States, which is the same thing. Therefore the opponents of his Administration were eager to convict him of attempting to do so. The people understood thoroughly that additions to the realm and the privilege of participating in the Government were matters to be determined by the sovereign, and that in the United States the sovereign was the people and not the President or the Senate. In Europe the king was sovereign, and therefore could do as he liked, or as his military forces enabled him to do. A king could extend his kingdom to the four corners of the earth if he had the requisite military force, and having conquered a province he could allow the conquered inhabitants to participate in his government as much or as little as he saw fit. But this great power of the sovereign was vested, under our form of government, in the people, and not in the Chief Executive nor the Commander in Chief of the Army and Navy. To permit the exercise of this power by a military officer, of however high degree, is to establish "militarism" in its worst and most obnoxious form. The most a President could do by treaty stipulations, or a military commander could do by conquest, was to give the sovereign people an opportunity to say what should be done with territory and its inhabitants. The will of the sovereign people in regard thereto was to be declared by the legislative department of the Government.

It was this difference between the President of the United States and the King of England to which the Supreme Court of the United States referred when, in speaking of the effect of the conquest of Mexico by the United States, it said:

In the distribution of political power between the great departments of this Government there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English Crown that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or in any other subject where the rights and powers of the executive arm of the Government are brought in question. (*Fleming v. Page*, 9 How., 618.)

So clearly did the public comprehend that the President could not exercise this prerogative of an absolute monarch, that had he attempted it, the effort would have terminated his public career. Hence the effort to attach the odium to Jefferson. The opponents of Jefferson failed because article 3 of the Louisiana treaty did not permit the construction they gave it. Had said article read (as does the late treaty with Spain)—

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress,

the attack on Jefferson would have been ridiculous as well as ineffective.

Mr. Elliott, of Vermont, in closing his address in support of Jefferson and the Louisiana treaty, sarcastically referred to the attack as follows:

The friends of the present Administration can behold, with emotions only of pity mixed with contempt, the innumerable little muddy, murmuring rills of faction, folly, and slander, which, like spots upon the orb of day, are scattered upon the fair scenery of our far-extended country. But they are compelled to listen, with a loftiness of feeling bordering on sublimity and not unmingled with terror, to the awful roaring of that tremendous torrent of opposition eloquence which resounds within these walls, thunders around the Capitol, terrifies the Administration, and makes even the Republican system itself tremble to its center. (*Annals of Congress*, 1803, p. 453.)

A week later (November 2, 1803), when the subject was discussed in the Senate, the attack on the President, based on article 3 of the treaty, was not pressed. The Senate, having participated in the ratification, was not inclined to assail its own action.

Senator Nicholas, of Virginia, said:

If the third article of the treaty is an engagement to incorporate the Territory of Louisiana into the Union of the United States, and to make it a State, it can not be considered as an unconstitutional exercise of the treaty-making power; for it will not be asserted by any rational man that the Territory is incorporated as a State by the treaty itself. (*Annals of Congress*, 1803, pp. 70-71.)

Senator Tracy, of Connecticut, called attention to the difference between the treaty-making powers possessed by the President and Senate of the United States and those possessed by European monarchs. He said:

The obvious meaning of this article is, that the inhabitants of Louisiana are incorporated by it into the Union upon the same footing that the Territorial governments are, and, like them, the Territory, when the population is sufficiently numerous, must be admitted as a State, with every right of any other State.

Have the President and Senate a constitutional right to do all this?

When we advert to the Constitution we shall find that the President, by and with the advice and consent of the Senate, may make treaties. Now, say gentlemen, this power is undefined, and one gentleman says it is unlimited.

True, there is no definition in words of the extent and nature of the treaty-making power. Two modes of ascertaining its extent have been mentioned; one is by ascertaining the extent of the same power among the monarchs of Europe and making that the standard of the treaty-making power here, and the other is to limit the power of the President and Senate in respect to treaties by the Constitution and the nature and principles of our Government.

Upon the first criterion it is obvious that we can not obtain any satisfactory definition for the treaty-making power, as applicable to our Government.

It is well known that in Europe any part of a country may be ceded by treaty, and the transfer is considered valid, without the consent of the inhabitants of the part thus transferred. Will it be said that the President and Senate can transfer Connecticut by treaty to France or to any other country? I know that a nation may be in war, and reduced to such necessitous circumstances as that giving up a part or half the territory to save the remainder may be inevitable. The United States may be in this condition, but necessity knows no law nor constitution either. Such a case might be the result of extreme necessity, but it would never make it constitutional. It is a state of things which can not, in its own nature, be governed by law or constitution. But if the President and Senate should, in ordinary peaceable times, transfer Connecticut against her consent, would the Government be bound to make laws to carry such a treaty into effect? Such a transfer of territory can certainly be made by the monarchs in Europe, under the head of the treaty-making power. I am convinced, sir, that only a cursory view of this subject will be sufficient to show every reasonable man that the treaty-making power in the United States can not be the same that it is in the European governments. (*Annals of Congress*, 1803, pp. 54-55.)

The men who fought to secure the independence of our country from monarchical institutions, who wrested sovereignty from a king and vested it in the people, who formed and adopted our Constitution, who laid the foundations of our Government, and worked out the principles on which it is established, placed a high value on the work they had performed. They believed that the great political powers, rights, and privileges which the Constitution created and conferred, were of priceless value, well worth the struggle by which they were secured, and were not to be hawked about the earth to be plucked by every man or nation whose interest or ambition might be advanced thereby. They were not the common property of mankind. They were the product and heritage of Americans, and to be kept as such. The man who undertook to cheapen them or bestow them on unworthy persons, laid impious hands upon the Ark and Covenant of our liberties, and his political standing was the forfeit of his sacrilege.

The outcome of the debate on the treaty in the Committee of the Whole House was a report to the House recommending the enactment of measures for the payment of the purchase price; to authorize the President to take possession of the territory and establish and maintain therein the sovereignty of the United States; and, as it was anticipated that the French and Spanish inhabitants would resist the new



sovereignty, the President was authorized to use the Army, the Navy, and the militia, then numbering eighty thousand, to enforce and protect that sovereignty in Louisiana; also to provide a form of government for the territory and inhabitants. (*Annals of Congress*, 1803, p. 488.)

The House appointed a special committee, with John Randolph as chairman, which immediately reported a bill emanating from the President. (*Adams's History*, vol. 2, p. 119.) The bill provided that:

all the military, civil, and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct. (2 U. S. Stat. L., p. 245.)

The "existing government" in that territory at that time was the one established by Spain, it having been continued by France. The effect and purpose of this law was to substitute Jefferson for the King of Spain and authorize him to exercise royal powers.

Mr. Rodney, of Delaware, speaking for the administration, explained the theory on which was founded the government proposed by the bill by declaring that:

Congress have a power in the territories which they can not exercise in the States, and that the limitations of power found in the Constitution are applicable to States and not Territories. (*Annals of Congress*, 1803, p. 514.)

Randolph defended the bill on the ground of necessity, and declared that the United States possessed unlimited powers of sovereignty in Louisiana, saying:

They (Congress) will see the necessity of the United States taking possession of this country in the capacity of sovereigns in the same extent as that of the existing government of the province. (*Annals of Congress*, 1803, p. 514.)

Jefferson's fiercest foe in Congress (or out of it for that matter) was Senator Pickering, of Massachusetts, who opposed the treaty, but declared that he—

Had never doubted the right of the United States to acquire new territory either by purchase or by conquest, and to govern the territory so acquired as a dependent province; and in this way might Louisiana have become territory of the United States, and have received a form of government infinitely preferable to that to which its inhabitants are now subject. (*Annals of Congress*, 1803, p. 45.)

The bill passed by a party vote and was signed by Jefferson, October 31, 1803.

This law was a temporary measure. Four weeks later the Senate appointed a committee to prepare a bill for territorial government of Louisiana. The committee was composed of Breckenridge, of Kentucky, Jackson and Baldwin, of Georgia, and John Quincy Adams, of Massachusetts; and they reported a bill that definitely determined the principle on which the new territory was to be governed. (Adams says this bill "was probably drawn by Madison in cooperation with

the President." Adams's History, vol. 2, p. 121.) The bill provided for a territorial government in which the people of Louisiana had no share. It set the new territory apart, as a peculiar estate, to be governed by a power implied from the right to acquire it.

The bill provided for a governor and secretary, to be appointed by the President. The legislative power was to be exercised by the governor and a legislative council of thirteen, appointed annually by the President. The laws were to be reported to the President, and, if disapproved by Congress, were to be of no force. There was a further restriction that "no law shall be valid which is inconsistent with the Constitution." The bill gave the governor the authority to "convene and prorogue" the legislative council at his pleasure. The judicial officers were to be appointed by the President. Trial by jury in civil cases was restricted to cases involving more than \$20, and in criminal cases to those wherein the death penalty might be imposed. The bill was considered in the Senate for six weeks, but the debate was not reported. It passed the Senate by a vote of 20 to 5. When the bill reached the House it was vigorously assailed by members of both parties. The opponents of the bill did not contend that the Constitution was in force in Louisiana. They did not insist that the inhabitants of the Territory possessed the rights, privileges, and immunities of citizens of the United States. They did insist that by the terms of article 3 of the treaty the United States was bound to *some time* incorporate the Territory and its inhabitants into the Union, and thereby bring them within the Constitution and permit them to participate in the Government. They called attention to the fact that the population consisted of Americans, Frenchmen, Spaniards, and Creoles—civilized, Christianized, intelligent people—and urged that it was safe and advisable to permit them to participate in the government of the Territory to the limited extent of electing the members of the legislative council and thereby familiarize themselves with our system of self-government. The unlimited power conferred upon the President and the authority given the governor were denounced in unmeasured terms.

Mr. Leib, of Pennsylvania, an extreme Democrat, took exception to the word "prorogue," and denounced the power of the governor to prorogue the council as "royal." (Annals of Congress, 1803, p. 1055.)

Mr. Gregg, of Pennsylvania, said:

He was opposed to the power it gave the President to appoint the members of the legislative council. It appeared to him a mere burlesque to say they shall be appointed by the President. (Annals of Congress, 1803, p. 1055.)

Mr. Varnum, of Massachusetts,

Was of opinion that the bill provided such a kind of government as had never been known in the United States. He thought sound policy, no less than justice, dictated the propriety of making provision for the election of a legislative body by the people. There was not only the common obligation of justice imposed upon Congress

to do this, but they were bound by treaty. The treaty makes it obligatory on the United States to admit the inhabitants of Louisiana, as soon as possible, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. (Annals of Congress, 1803, p. 1056.)

Mr. Lyon, of Kentucky, vehemently opposed the selection of the legislative council by appointment. Such a government, he declared, reduced the inhabitants to "slavery" and gave Jefferson the powers of Bonaparte. (Annals of Congress, 1803, pp. 1059-1060.)

Mr. Campbell, of Tennessee, said of the bill:

It really establishes a complete despotism; it does not evince a single trait of liberty; it does not confer one single right to which they are entitled under the treaty; it does not extend to them the benefits of the Federal Constitution, or declare when, hereafter, they shall receive them.

Mr. Campbell believed that the inhabitants possessed the right to participate in the government, independent of the Constitution, and that said right was limited only by their intelligence and ability to exercise it. He believed the inhabitants of Louisiana were sufficiently informed as to the workings of our Government and devoted to the principles of civil liberty to be allowed to exercise the elective franchise in selecting the legislative council. (Annals of Congress, 1803, pp. 1063-1067. See also amendment offered by Campbell, p. 1078.)

Mr. Jackson could not agree that the inhabitants of Louisiana were not qualified to receive a free government. He said:

It is urged by gentlemen that we ought to give to this people liberty by degrees. I believe, however, there is no danger of giving them too much of it; and I am unwilling to tarnish the national character by sanctioning the detestable calumny that man is not fitted for freedom. What will the world say if we sanction this principle? They will see we possess the principle of despotism under the garb of republicans, and that we are insincere, with whatever solemnity we may declare it, in pronouncing all men equal. They will tell us that we have emphatically declared to the American people and to the world, in our first act evincive of emancipation from the tyranny of England, that all men are equal, and that all governments derive their rightful power from the consent of the governed, and that notwithstanding, when the occasion offers, we exercise despotic power under the pretext that the people are unable to govern themselves. (Annals of Congress, 1803, p. 1071.)

Mr. Sloan said:

I was yesterday about to rise to express my disapprobation of the section now under consideration, and my concern on hearing sentiments adduced in support of its principle, which I consider as repugnant to justice and sound policy as frost is to fire, or darkness to light, when my friend from Tennessee (Mr. G. W. Campbell) rose, and in so clear and explicit a manner opposed the bill and exposed its unjust, impolitic, dangerous, and despotic principle, that nothing appeared necessary to be added; after which I flattered myself no further attempts would be made to support a principle subversive of the inalienable rights of man, but, to my surprise, I hear a repetition of sentiments urged in favor of this principle.

Here let me ask, Can anything be more repugnant to the principles of just government; can anything be more despotic than for a president to appoint a governor and legislative council, the governor having a negative on all their acts, and power to prorogue them at pleasure? What liberty, what power is here vested in the people? (Annals of Congress, 1803, p. 1074.)

In support of the bill, Mr. Eustis, of Massachusetts, said:

It is extremely difficult to form any system of government for this Territory with our ideas of civil liberty under the Constitution of the United States. It appears to me that before we determine the principle on which the council is to be formed it is necessary distinctly to understand the genius, the manners, the disposition, and the state of the people to be governed. The treaty has been resorted to by my colleague to show that they are entitled to elect their own legislature. It says:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."

Are the people of Louisiana admitted at this time or not, with all the rights of citizens of the United States? The answer to this inquiry will lead to a right decision of the question under discussion. If they are so admitted they are entitled to all the rights of citizens of the United States. And if they are thus entitled there remains another inquiry: Are they qualified from habit and from the circumstances in which they are placed to exercise these high privileges? If they are both entitled and qualified to enjoy them we can have no hesitation in pronouncing the bill grounded on a wrong principle, that it ought to be rejected, and another a bill, of a far different nature, be introduced in its room. But I do not consider the subject in this light. The people, in my opinion, are at present unprepared for and undesirous of exercising the elective franchise. The first object of the Government is to hold the country. How? By protecting the people in all their rights, and by administering the government in such a manner as to prevent any disagreement among them, to use no other term. Suppose the people called upon to choose those who are to make laws for them, does the information we possess justify the belief that this privilege would be so exercised as to conduce to the peace, happiness, and tranquillity of the country? I apprehend not.

\* \* \* \* \*

The government laid down in this bill is certainly a new thing in the United States; but the people of this country differ materially from the citizens of the United States. I speak of the character of the people at the present time. When they shall be better acquainted with the principles of our Government, and shall have become desirous of participating in our privileges, it will be full time to extend to them the elective franchise. Have not the House been informed from an authentic source, since the session, that the provisions of our institutions are inapplicable to them? If so, why attempt, in pursuit of a vain theory, to extend political institutions to them for which they are not prepared? I am one of those who believe that the principles of civil liberty can not suddenly be ingrafted on a people accustomed to a regimen of a directly opposite hue. The approach of such a people to liberty must be gradual. I believe them at present totally unqualified to exercise it. If this opinion be erroneous, then the principles of the bill are unfounded. If, on the contrary, this opinion is sound, it results that neither the power given to the President to appoint the members of the council or of the governor to prorogue them are unsafe or unnecessary.

The extension of the elective franchise may be considered by the people of Louisiana a burden instead of a benefit. I have understood there is none of that equality among them which exists in the United States; grades are there more highly marked, and they may deem it rather a matter of oppression to extend to them the privileges which we deem inestimable, and with the value of which we have been long familiar.

Before we decide this principle it is absolutely necessary to consider the relation of these people to the United States. I consider them as standing in nearly the same relation to us as if they were a conquered country. By the treaty they are, it is true, entitled to the enjoyment of all the rights, advantages, and immunities of

citizens of the United States and to be incorporated into the Union as soon as possible, according to the principles of the Federal Constitution. But can they be admitted now? Are they at this moment so admitted? If not, they are not entitled to these rights; but if they were I should doubt the propriety of extending them to them.

If the present provisions of the bill are carried into effect there will be more security than will arise under the motion of my colleague. It is very natural and honorable to gentlemen of liberal minds to be desirous of extending to this people the privileges enjoyed by our own citizens, but sentiments of this kind, however liberal and praiseworthy, may be carried in the face of facts and may operate injuriously on those they are intended to benefit.

\* \* \* \* \*

Upon the whole, as the bill only purports to provide for a temporary government, and as in the course of a year we shall have more information respecting the country, when it will be in our power, in case such information shall justify it, to extend all the privileges which gentlemen seem so desirous of doing, I hope the committee will not rise or agree to strike out this section. (*Annals of Congress, 1803, pp. 1058-1059.*)

Mr. Holland, replying to Mr. Jackson, said:

As my ideas are very different from those of the gentleman who has preceded me, and as I do not believe that either policy or moral obligation recommends the adoption of a system such as he has avowed to be proper, I will, in a few words, state the sentiments I entertain. I do not view this discussion as involving the question whether the people of Louisiana shall be admitted into the United States. The only question is whether we shall extend to them the right of free suffrage in its fullest extent and such as is enjoyed by the people of the United States. Gentlemen in favor of striking out this section seem impressed with the idea that every gentleman friendly to the section is in favor of an absolute despotism, is inimical to their rights, is desirous of making the people of Louisiana slaves. They take the ground that if we deny them this right we deny them everything; but there is a wide difference between denying them the privilege of election and extending to them other high privileges, more, perhaps, than they are capable of enjoying. This law will extend to them the privileges of 21 acts of the United States to which the freemen of the United States are subject. Is this nothing? Gentlemen say they ought not to be subjected but to laws of their own making, but the whole frame of this bill contradicts the assertion, as it principally consists in imposing laws which the people never made or ought to participate in making. Will the gentleman take the broad ground that people should never be governed but by laws of their own making? This is, indeed, the amount of the argument, and proving too much it proves nothing. Mr. H. said he believed the people of St. Domingo who had been alluded to, not qualified to support a free government, not possessed of sufficient knowledge. People who never had an opportunity to obtain knowledge can not be supposed to possess it, and no kind of knowledge was more difficult to obtain than that which qualified men to be legislators. Can gentlemen conceive the people of Louisiana, who have just thrown off their chains, qualified to make laws? Under the late system the people had no concern in the Government, and it was even criminal for them to concern themselves with it; they were set at a distance from the Government, and all required from their hands was to be passive and obedient. Can it be supposed such a people made the subject of government their study, or can it be presumed they know anything about the principles of the Constitution of the United States? Would persons thus elected be of any service to the Government? So far from being an assistance, they would be an incumbrance. Why, then, impose this burden upon them? The object of this bill is to extend the laws of the United States over Louisiana, not to enable the

people of Louisiana to make laws. This extension, so far from being an act of despotism, will be an important privilege. If the laws of the United States were founded in injustice they might have some right to complain, but we only apply to them laws by which we ourselves consent to be governed. Gentlemen say if we deny the right of self-government we deny everything. But before they are permitted to make laws ought they not to understand what law is? If we give power to the people, will they not choose persons as ignorant as themselves? It is a fact that many of the most respectable characters in the country conceive the principle of self-government a mere bubble, and they will not consider themselves aggrieved if it is not extended to them. Does the history of nations show that all men are capable of self-government? No such thing. It shows that none but an enlightened and virtuous people are capable of it; and if the people of Louisiana are not sufficiently enlightened, they are not yet prepared to receive it. If this be the case, the arguments of gentlemen are inconclusive. They are not prepared for self-government. For what are they prepared? To remain in a passive state and to receive the blessings of good laws; and receiving these, they have no reason to complain.

\* \* \* \* \*

When the people understand the value of laws equally and impartially administered, and begin to feel an attachment to the United States, and to inquire into the principles of free government, it will be time enough to give them the elective franchise. (*Annals of Congress*, 1803, pp. 1072-1073.)

A majority of the House refused to support the President's bill, and amended it so as to authorize the inhabitants of Louisiana to elect the members of the legislative council. The Senate refused to concur, and the outcome as stated in the *Annals*, was:

It may not be unsatisfactory here to state that the bill, as finally passed, is limited in duration to one year from the 1st day of October next (when it is to take effect) and thence to the end of the next session of Congress. It directs the appointment by the President of a governor, to hold his office for four years; the appointment annually of a legislative council, composed of inhabitants of Louisiana, and the appointment of judges. It will be perceived that the principle of the Senate, withholding for the present the right of suffrage from the people of Louisiana, prevailed, subject, however, to the limitation of time introduced in the bill by the House of Representatives. (*Annals of Congress*, 1803, p. 1230.)

In 1804 Jefferson was a candidate for reelection to the Presidency. The course pursued by his Administration in the acquisition and government of Louisiana was submitted to the people. Jefferson received 162 electoral votes out of 176, while in 1801 he received but 73 out of 138.

In the Ninth Congress (1805) the opposition to Jefferson could muster only 7 Senators out of 34, and 25 Representatives out of 141. The extent of his triumph is thus described:

From the St. Marys to the Potomac and the Ohio every electoral voice was given to Jefferson. With some surprise the public learned that Maryland gave 2 of 11 votes to C. C. Pinckney, who received also the 3 votes of Delaware. This little State even went back on its path, repudiated Caesar A. Rodney, and returned to its favorite, Bayard, who was sent by a handsome majority to his old seat in the House of Representatives. Broken for an instant only by this slight check, the tide of Democratic triumph swept over the States of Pennsylvania, New Jersey, and New York, and burst upon Connecticut as though Jefferson's hope of dragging even that

State from its moorings were at length to be realized. With difficulty the Connecticut hierarchy held its own, and with despair after the torrent passed by it looked about and found itself alone. Even Massachusetts cast 29,310 votes for Jefferson, against 25,777 for Pinckney.

\* \* \* \* \*

At the close of four years of administration all Jefferson's hopes were fulfilled. He had annihilated opposition. The slanders of the Federalist press helped to show that he was the idol of four-fifths of the nation. (Adams's History, vol. 2, p. 201.)

The Eighth Congress, in which occurred the two debates on Louisiana, was composed of Federalists and State rights men, strict constructionists and liberal constructionists, extremists and conservatives of both parties and schools. Yet all agreed that the newly acquired territory could not become incorporated into the United States or bound and benefited by the Constitution except by legislative action of Congress. As to the government of such territory little doubt was expressed as to the right of Congress to govern it as a colony. The serious doubt arose as to the right of the nation to ever govern it in any other way.

**THE CONTROVERSY BETWEEN ANDREW JACKSON, MILITARY GOVERNOR OF FLORIDA, AND JUDGE FROMENTIN, UNITED STATES JUDGE FOR THAT TERRITORY, AS TO THE CORRECTNESS OF THE DOCTRINE OF EX PROPRIO VIGORE.**

When the United States acquired East and West Florida the Louisiana law was taken for a model and the Government of Florida was the same as had been that of Louisiana. Monroe was President, and he followed Jefferson's example and acted upon Jefferson's advice. When the Florida bill was pending in Congress an amendment was offered providing as follows:

That all the principles of the United States Constitution, for the security of civil and religious freedom, and for the security of property, and the sacredness of rights to things in action; and all the prohibitions to legislation, as well as with respect to Congress as the legislatures of the States, be, and the same are hereby declared to be, applicable to the said Territory, as paramount acts. (Annals of Cong., 1st sess., 17th Cong., vol. 2, p. 1374.)

This amendment was voted down. In opposing the amendment Mr. Rhea, speaking for the Administration, said:

The people of Florida (except citizens of the United States who may have removed there either temporarily or permanently) know little of our Constitution and laws; to these they are strangers. Many principles of the Constitution of the United States require laws of the United States to carry them into operation. \* \* \* That the Constitution of the United States shall obtain and have full force and effect in a territory not included within the bounds and limits of the territories of the old thirteen States, or either of them, but which has been acquired by treaty from any foreign power since the adoption of that Constitution, and that the inhabitants of such territory shall be entitled to all the rights, privileges, and immunities, sanctioned and confirmed by the Constitution to the citizens of the United States; it appears necessary and consistent with the Constitution of the United States that the sovereign people shall, by the Congress of the United States, enact laws preparatory to, and

declaratory of, the admission of such territory to a participation of the rights, etc., derived from the Constitution, and afterwards to be admitted a State of this Union on the same footing as one of the original States; the people of such new State will then have their full representation in both Houses of the Congress of the United States, and then the Constitution of the United States is in full operation in and over such new States as it is in one of the original States. (Ib., p. 1375.)

Next an amendment was offered to authorize the people of Florida to elect their legislative council. This amendment received only 15 votes, and was lost. (Ib. p. 1377.)

The bill passed without amendment and was approved by President Monroe. The following is Benton's comment on the incident:

This prompt rejection of Mr. Montgomery's proposition shows what the Congress of 1822 thought of the right of Territories to the enjoyment of any part of the Constitution of the United States. \* \* \* The only question between Mr. Montgomery's proposition and the clause already in the bill was as to the tenure by which these rights should be held—whether under the Constitution of the United States or under a law of Congress and the treaty of cession, and the decision was that they should be held under the law and the treaty. Thus a direct issue was made between constitutional rights on one hand and the discretion of Congress on the other in the government of this Territory, and decided promptly and without debate (for there was no speech after that of Mr. Rhea on either side) against the Constitution. It was tantamount to the express declaration: "You shall have these principles which are in the Constitution, but not as a constitutional right nor even as a grant under the Constitution, but as a justice flowing from our discretion and as an obligation imposed by the treaty which transferred you to our sovereignty." (Benton's Abridgment, vol. 7, p. 295, note.)

Andrew Jackson, then a major-general, was appointed governor of Florida under this bill and authorized by the President to exercise all the powers theretofore possessed by the Spanish governors of East and West Florida and in addition the powers of the captain-general of Cuba and the intendant of Cuba. Jackson went to Florida and proceeded to exercise these powers in the style for which he is still famous. As a legislature he enacted many laws, some of which were afterwards repealed by Congress; as the supreme court and chancellor of the Territory he heard and determined many cases both at law and in equity, and as the chief executive or governor he extended his authority to issuing orders expelling certain inhabitants from the Territory.

Shortly after Jackson assumed control, a matter arose which squarely raised the question as to whether the Constitution followed the flag into Florida.

Jackson learned that a Spanish military officer named Sousa had in his possession and refused to surrender certain documents relating to the claims of a private individual to an estate. Jackson issued an order requiring the delivery of these documents to the American authorities. Instead of complying with the order, Sousa consulted the commander of the Spanish forces, Colonel Callava, who instructed him to turn over the documents to the steward of the Colonel's household; which instruc-



tion was obeyed. When Jackson learned of this, he caused the three Spanish officers to be seized and thrown into prison, searched the house of the Colonel, and found and retained the documents. This action created a sensation, and a great crowd of people marched to the residence of Judge Fromentin, the United States judge of the Territory, to whom application was made for a writ of *habeas corpus*. The United States judge issued the writ. When the writ was served on Jackson he refused to obey it, on the ground that Congress had not extended the Constitution and laws of the United States to Florida. He also ordered Judge Fromentin to appear before him for contempt. The judge insisted that the inhabitants of Florida were entitled to the writ of *habeas corpus* by virtue of the treaty which guaranteed them the privileges and immunities of American citizens, and also because he thought the Constitution and laws of the United States were in force in Florida.<sup>a</sup> In reporting this to the President, Jackson says:

If it be not sufficient to strike him from the roll of judges, I must say that ignorance of law is no objection against anyone's holding a judicial station. Judge Fromentin was represented to me to be no lawyer, \* \* \* but I could not have formed such an idea of his want of legal knowledge as this transaction displays. (Annals of Cong., 1st sess. 17th Cong., vol. 2, p. 2300.)

In the same report Jackson also says:

The lecture I gave the judge when he came before me will I trust for the future cause him to obey the spirit of his commission, aid in the execution of the laws and administration of the Government instead of attempting to oppose me.

Judge Fromentin appealed the controversy to Washington. This is what he wrote to Secretary Adams:

The American flag, it is true—the flag of liberty—waves on our forts; a treacherous sign in Florida. Sir, the *bohuu upas* tree of slavery overshadows us. (*Ib.*, p. 2381.)

The question now to be decided is not the insignificant and unimportant question of the difficulty between General Jackson and myself. It is a question of country or no country, Constitution or no Constitution, liberty or slavery. The despotism which attacks the liberty of one of the meanest of the inhabitants of this country makes an attack upon the liberty of all. \* \* \* I speak not this now with reference only to the present occasion; but, sir, tyrants beget tyrants. Beware! (*Ibid.*, p. 2472.)

In spite of this distracted appeal President Monroe and his Secretary of State, John Quincy Adams, sustained Jackson. Their decision was communicated to Judge Fromentin by a letter wherein Secretary Adams says he is directed by the President—

To inform you that the laws of the United States relative to the revenue and its collection, and those relating to the slave trade, having been the only ones extended by act of Congress to the Territories of Florida, it was to the execution only of them that your commission as judge of the United States was considered and intended to

<sup>a</sup> For all the documents in the case, see Folio State Papers, 2 Miscellaneous, 799. The important papers are in 21 Niles Register. For Fromentin's theory of his action, 21 Niles, 252.

apply. The President thought the authority of Congress alone competent to extend other laws of the United States to newly acquired territory. (Annals of Cong., 1st sess., 17th Cong., vol. 2, p. 2412.)

Attention is called to the fact that in 1821 three American statesmen, James Monroe, John Quincy Adams, and Andrew Jackson, each of whom was elected President of the United States, officially declared that the Constitution and laws of the United States do not extend over newly acquired territory, *ex proprio vigore*, and that such extension, if made, must be by act of Congress.

The action of the Monroe Administration was not taken until after deliberate consideration. The matter was discussed at three meetings of the Cabinet, and the form of the letter was not decided upon until several days thereafter. (Memoirs of John Quincy Adams, vol. 5, pp. 366-380.) At the time this incident arose (October, 1821) John C. Calhoun was Secretary of War. It is interesting to note that he participated in the Cabinet consideration of this question, as then presented, and that in the Cabinet:

The opinion was unanimous that as the only laws extended to the territory were those of the revenue and against the slave trade, Fromentin's jurisdiction was confined to them, and he had no right to issue the writ of habeas corpus. (5 Adams's Memoirs, pp. 367, 368.)

The view finally accepted by the Cabinet was as follows:

We have acquired a Spanish province, heretofore governed by arbitrary principles and by military rule. Congress had not time at their last session to introduce our checked and balanced system of government there. They continued, therefore, until their next session, the ancient system of government; and all the powers formerly exercised by the supreme rulers of the province were vested in the governor. The military was their only executive. To deny the governor the right to command the soldiers was to strip him of all effective power. If citizens of the United States went into the province, they must go and abide there conformably to the law of the time and the place. *They can not carry the Constitution or the laws of the United States there with them. To this the authority of Congress is alone competent.* (5 Adams's Memoirs, pp. 369, 370.)

**THE DEBATE IN THE SENATE OF THE UNITED STATES IN 1849, LED BY WEBSTER AND CALHOUN, ON THE PROPOSITIONS INVOLVED IN THE TWO QUESTIONS—**

1. *Do the Constitution and the body of laws of the United States, ex proprio vigore, extend over territory newly acquired by the United States?*

2. *Can the Constitution be extended over territory newly acquired by the United States, either ex proprio vigore or by act of Congress, prior to the creation of a State in said territory?*

The doctrine of the extension of the Constitution and laws of the United States over newly acquired territory was originally promulgated by John C. Calhoun, at the time a Senator from South Carolina,

in his speech on the Oregon territorial bill, delivered in the Senate in 1848, wherein he said:

But I deny that the laws of Mexico can have the effect attributed to them (that of keeping slavery out of New Mexico and California). As soon as the treaty between the two countries is ratified the sovereignty and authority of Mexico in the territory acquired by it become extinct and that of the United States is substituted in its place, carrying with it the Constitution, with its overriding control over all the laws and institutions of Mexico inconsistent with it.<sup>a</sup>

The treaty of peace with Mexico was proclaimed July 4, 1848. The conditions then existing in California demanded the immediate establishment of a Territorial government. The military government was having difficulty to maintain its authority, for the discovery of gold led to constant desertions from military service by the soldiers and brought into the territory a great number of lawless persons. Congress sat for six months after the treaty had been ratified attempting to provide government for the new territories, but such were the distractions of the slavery question that their efforts were unavailing. Another session was had and was drawing to a close with the same fruitless result. In the closing days of the session the general appropriation bill came from the House to the Senate. It was considered and was ready to be returned to the House, when Mr. Walker, of Wisconsin, moved to amend it by attaching a section providing a temporary government for the ceded territories and extending over them certain designated acts of Congress. Subsequently Mr. Walker, at the solicitation of other Senators, modified his amendment so as to provide for the extension of the Constitution over said territories. (Cong. Globe, vol. 20, p. 561.)

The announcement of the doctrine of the extension of the Constitution, *ex proprio vigore*, over territory newly acquired, opened an alarming prospect to the opponents of slavery. They feared that the Supreme Court of the United States would sustain the doctrine and thereby bring to naught the efforts made to keep slavery out of the Territories. They vehemently assailed the Walker amendment, at first, upon the grounds of expediency. This placed them at a disadvantage, for the necessity of providing a government for California was obvious. The supporters of the Calhoun doctrine were equally at a disadvantage, for, if the Constitution extended over New Mexico and California, *ex proprio vigore*, there was no use in resorting to Congressional action for the accomplishment of that extension. The discussion took the regular slavery turn. That portion of it which is of interest in connection with the application of the doctrine to the conditions now calling for consideration, arose as follows:

Mr. Bell, of Tennessee, offered an amendment to the Walker amendment, providing for the immediate creation of the "State of Cali-

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<sup>a</sup> For Calhoun's view on proposition at time Florida was annexed, see *ante*, page 140.

fornia" by Congressional enactment and that such State, so created, "is hereby admitted into the Union." (Cong. Globe, vol. 20, p. 562.)

Mr. Berrien, of Georgia, a member of the Judiciary Committee, assailed this proposal as being in excess of the powers of Congress, since the Constitution did not confer the authority to *create* States upon that body. In the course of his argument he said:

But I put the question, since it is obvious that this whole subject was considered by the convention—since they gave to Congress the power to make rules and regulations for the government of the Territories and authorized them to admit new States—would they have overlooked the condition of the people of a Territory, in their transition state from their Territorial condition to that of a State, if they had intended to invest Congress with power over that subject, the power to create a State? No, sir. It was omitted, and purposely omitted, in obedience to those great and broad principles by which that convention was actuated—to the principles of popular sovereignty which belongs to every free people, which requires that those who are to constitute the State are alone competent to organize it. Sir, this interpretation of the Constitution has been verified by the uniform usage of this Government from the very time of its foundation to the present moment.

\* \* \* \* \*

But the question here is, whether the State that is formed by the people of a Territory, with the consent of Congress, is created by the people or by Congress? And when that question is examined by the Senator from Tennessee I think he will find it can not admit of a doubt. Congress does not form a constitution and government for the new State. It authorizes the people of the Territory to do this. If the power was in Congress, why do they not exercise it? If Congress possessed the power of creating a State, why do they depute the power to another and not exercise it themselves? Could they exercise it? Could they form a constitution for the new State and compel the people of the Territory to accept it and become a State? Sir, it was under the conviction of a total want of power—in obedience to that principle of free governments that it belongs to the people who are to form the State to frame the constitution which is to regulate the action of that State. (Appendix to Cong. Globe, vol. 20, p. 254.)

Mr. Dayton, of New Jersey, desired to provide for the government of California by the enactment of a law containing the provisions of the statute which gave a temporary government to Louisiana and Florida. (Appendix to Cong. Globe, vol. 20, p. 256.) He opposed the plan of creating a State by Congressional action, and, respecting that proposal, said:

How can you make California a State government? Can Congress *create* a State? Congress *create* a State! Sir, I never thought, until I heard it here a day or two since from the Senator from Tennessee (Mr. Bell), that such a proposition could have entered the mind of any human being. His idea is, that Congress can alone create a State; that no State government can be created in our Territories, save by revolution, if without the authority of Congress. Now, what does this argument prove? Suppose no State could be created in Territories without the leave of Congress, either in advance or by adoption afterwards, save by revolution, what does it prove? It only proves, sir, that we can admit a State into the Union which is a State *de facto* by revolution. When the debates of the convention were in progress, the section declaring that new States may be admitted was inserted with reference to a future admission of the Canadas, then a dependent province, which of course could only become States by revolution. The only object of the section was to admit a State

which might become so by revolution. If we have power to create a State, why do we not do it? Why say to the people of our Territories, as we ever have, if you are disposed to create a State we will admit you? It is an act of popular sovereignty, exercise it if you please. Our power is to *admit*, permit you to come, not to force you. If we had this power to create, all we would have to do would be to pass a law and resolve that California was a State, and it would become one. A schoolboy may cut a man out of a bit of paper and say it is a man, but is it a man? Has it the blood, bones, and sinews of a man? You call this Territory a State, but is it a State? Has it any of the essential powers or prerequisites of a State? Can it do anything that a State can do? If not, what a farce is it to call it a State. (Appendix to Cong. Globe, vol. 20, p. 257.)

Later in the discussion Mr. Dayton further said:

I supposed it was a clear point that the Constitution of the United States, being a contract and agreement between sovereign States, could be extended no further than it, by its inherent power, extended itself. No act of legislation could make that compact between sovereign States reach further than to these States. Now, the Senator talks about the principles of the Constitution. Why, the Constitution, sir, does not consist of matters of principle. It is a compact and agreement between sovereign States. It is not like the principles of the common law or the principles of the civil law. It is something entirely different in all its aspects. I hope that I am not intruding upon the time of the Senator from Wisconsin in saying that the Constitution can not, by legislative act, be extended an inch beyond the territory over which its inherent power will carry it. (Appendix to Cong. Globe, vol. 20, p. 268.)

Mr. Hale, of New Hampshire, opposed both the Calhoun doctrine and the Walker amendment, basing his opposition upon the fact that the Constitution was a compact between *States*, created in order to form a more perfect union of *States*, and, under our theory of government, it was necessary for a State to be in existence and to manifest its willingness to enter the compact in order to become a party thereto, and therefore the Constitution could not extend to territory, organized or unorganized, either *ex proprio vigore* or by Congressional enactment. In the course of his argument Mr. Hale said:

I am at a loss to see how the Constitution, which is an agreement by which the people of the United States pledge themselves to the performance of certain duties, for the mutual attainment of certain great ends and securing great privileges, can, by any act of legislation, an exercise of mere arbitrary power, be extended over those who do not voluntarily become parties to the compact. You and I may make a bargain and bind ourselves to carry out our agreement, but how can we extend its restrictions over those who do not agree to its stipulations? We may extend the invitation to the people of these Territories, under certain restrictions, to band themselves together so that they may become parties to this confederacy, but for us to extend to them the privileges of an agreement with the provisions of which they will not concur strikes me, with all due respect to the Senators who advocate the principle, as an absurdity.

What is this Constitution? If anything, it is a fundamental law, and if we may extend its provisions by legislative enactment we may withdraw them in the same manner. If the Constitution of the United States, by an act of the two Houses of Congress, may be extended to a people who do not desire to take it, why may we not take it away from that people upon the same principle that we have extended to them? Sir, the framers of this Constitution did not so understand it. By the Constitution it was provided that as soon as nine of the States had adopted it it should

go into operation and be obligatory on them. Now, if the doctrine advanced by the Senator from Wisconsin be true, all that these nine States had to do in order to have the whole Confederacy united in support of the Constitution at that particular time was to extend its provisions over the four remaining States, notwithstanding their disapproval of it. Such a construction of the Constitution as this never entered the heads of its framers, nor did they ever treat it as anything but what it purports to be—a compact. But the Senator from Georgia endeavors to meet this difficulty by saying that we may extend one or more of the provisions of the Constitution by legislative enactment, so that the people of the Territories may be governed by these provisions of the Constitution. And so we may extend any of the provisions of the Constitution, one by one, and make them the law of that country. But this is a different thing from extending the Constitution itself. There is exactly the same objection in my mind to this amendment that there was to the amendment proposed to the famous compromise bill reported at the last session. It proposed not to make any enactment which you dared not make at that time. As we did not dare to make the enactment we attempted to get around it by transferring to the judiciary the performance of the duty which we ought to have executed ourselves. This amendment, if it does anything at all, adopts the very principles of the compromise bill; it provides that the Constitution, whatever may be its provisions on the subject of slavery, shall be extended over these Territories, and then leaves the interpretation and execution of these provisions to the decision of the Supreme Court, exactly in the same manner as the compromise bill did.

There is another article in the preamble to the Constitution, as originally formed, which throws some light upon this question, and that is the declaration that the Constitution was formed “*for the United States.*” And there is great force in the suggestion thrown out by the Senator from New Jersey (Mr. Dayton) that he did not understand the Territories as being subject to the Constitution as an entire instrument, because the first section of the third article provides that “the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior,” and we appoint judges of the inferior courts in the Territories for a limited time, thus conceding that the Constitution, as a whole, does not extend over these Territories, nor can it do so; the idea is absurd. This is the main difficulty in the way of the amendment of the Senator from Wisconsin, that instead of recognizing the Constitution simply as a compact he regards it as a law which we may extend or not at our pleasure, which I think is not competent for us to do. (Appendix to Cong. Globe, vol. 20, p. 270.)

None of the supporters of the Calhoun doctrine seemed to entertain the idea that the Constitution and body of laws of the United States extended, in entirety, over New Mexico and California. It was conceded that the extension was limited to such parts of the Constitution and body of laws as were applicable to the conditions existing in said territory.

Mr. Butler, of South Carolina, said:

I go further and say that, *proprio vigore*, the moment that Territories are acquired under treaty the provisions of the Constitution of the United States extend to that Territory, to some, though not to the entire, extent of its provisions. This Territory was acquired under treaty, and I say that the provisions of the Constitution, with the qualification of applicability, are now, *proprio vigore*, the fundamental law of California and New Mexico. And when I say that, I admit that there may be wanting some machinery of courts and officers to carry out those provisions, but they nevertheless exist as the fundamental law. (Appendix to Cong. Globe, vol. 20, p. 271.)

At this point in the debate occurred the famous colloquial discussion of the subject between Webster and Calhoun. This discussion has such direct bearing upon the subject that it is quoted in full.

MR. WEBSTER. Mr. President, it is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us; and especially that we should seek to get some conception of what is meant by the proposition in a law to "extend the Constitution of the United States to the Territories." Why, sir, the thing is utterly impossible. All the legislation in the world in this general form could not accomplish it. There is no cause for the operation of the legislative power in such a manner as that. The Constitution—what is it? We extend the Constitution of the United States to territory! What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall be represented in the legislature which it establishes, with not only a right of debate and a right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice-President? And can we by law extend these rights, or any of them, to a Territory of the United States? Everybody will see that it is altogether impracticable. Well, sir, the amendment goes on and says that the revenue laws shall, so far as they are suitable, be applied in the Territories. Now, with respect to that qualification made by the honorable member from Wisconsin, I shall like to know if he understands it, as I suppose he does. Does the expression "as far as suitable" apply to the Constitution or the revenue laws, or both?

MR. WALKER. It was not the proposition to extend the Constitution beyond the limits to which it was applicable.

MR. WEBSTER. It comes to this, then, that the Constitution is to be extended as far as practicable; but how far that is to be decided by the President of the United States, and therefore he is to have absolute and despotic power. He is the judge of what is suitable and what is unsuitable, and what he thinks is suitable is suitable, and what he thinks unsuitable is unsuitable. He is "omnis in hoc;" and what is this but to say in general terms that the President of the United States shall govern this Territory as he sees fit till Congress makes further provision? Now, if the gentleman will be kind enough to tell me what principle of the Constitution he supposes suitable, what discrimination he can draw between suitable and unsuitable, which he proposes to follow, I shall be instructed. Let me say that in this general sense there is no such thing as extending the Constitution. The Constitution is extended over the United States and over nothing else, and can extend over nothing else. It can not be extended over anything except over the old States and the new States that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, and especially professional and judicial gentlemen. It seems to be taken for granted that the right of trial by jury, the habeas corpus, and every principle designed to protect personal liberty is extended by force of the Constitution itself over every new Territory. That proposition can not be maintained at all. How do you arrive at it by any reasoning or deduction? It can only be arrived at by the loosest of all possible constructions. It is said this must be so, else the right of the habeas corpus would be lost. Undoubtedly these rights must be conferred by law before they can be enjoyed in a Territory.

Sir, if the hopes of some gentlemen were realized, and Cuba were to become a possession of the United States by cession, does anybody suppose that the habeas corpus and the trial by jury would be established in it by the mere act of cession? Why more than election laws and the political franchises, or popular franchises? Sir, the whole authority of Congress on this subject is embraced in that very short provision that Congress shall have power to make all needful rules and regulations

respecting the Territories of the United States. The word is Territories; for it is quite evident that the compromises of the Constitution looked to no new acquisitions to form new Territories. But as they have been acquired from time to time, new Territories have been regarded as coming under that general provision for making rules for Territories. We have never had a Territory governed as the United States are governed. The legislature and the judiciary of Territories have always been established by a law of Congress. I do not say that while we sit here to make laws for these Territories, we are not bound by every one of those great principles which are intended as general securities for public liberty. But they do not exist in Territories till introduced by the authority of Congress. These principles do not, *proprio vigore*, apply to any one of the Territories of the United States, because that Territory, while a Territory, does not become a part, and is no part, of the United States.

MR. CALHOUN. I rise, not to detain the Senate to any considerable extent, but to make a few remarks upon the proposition first advanced by the Senator from New Jersey, fully indorsed by the Senator from New Hampshire, and partly indorsed by the Senator from Massachusetts, that the Constitution of the United States does not extend to the Territories. That is the point. I am very happy, sir, to hear this proposition thus asserted, for it will have the effect of narrowing very greatly the controversy between the North and the South, as it regards the slavery question in connection with the Territories. It is an implied admission on the part of those gentlemen that, if the Constitution does extend to the Territories, the South will be protected in the enjoyment of its property—that it will be under the shield of the Constitution. You can put no other interpretation upon the proposition which the gentlemen have made than that the Constitution does not extend to the Territories.

Then the simple question is, Does the Constitution extend to the Territories, or does it not extend to them? Why, the Constitution interprets itself. It pronounces itself to be the supreme law of the land.

MR. WEBSTER. What land?

MR. CALHOUN. The land; the Territories of the United States are a part of the land. It is the supreme law, not within the limits of the States of this Union merely, but wherever our flag waves—wherever our authority goes, the Constitution in part goes, not all its provisions, certainly, but all its suitable provisions. Why, can we have any authority beyond the Constitution? I put the question solemnly to gentlemen: If the Constitution does not go there, how are we to have any authority or jurisdiction whatever? Is not Congress the creature of the Constitution? Does it not hold its existence upon the tenure of the continuance of the Constitution, and would it not be annihilated upon the destruction of that instrument, and the consequent dissolution of this confederacy? And shall we, the creature of the Constitution, pretend that we have any authority beyond the reach of the Constitution? Sir, we were told a few days since that the courts of the United States had made a decision that the Constitution did not extend to the Territories without an act of Congress. I confess that I was incredulous, and I am still incredulous that any tribunal, pretending to have a knowledge of our system of government, as the courts of the United States ought to have, could have pronounced such a monstrous judgment. I am inclined to think that it is an error which has been unjustly attributed to them; but if they have made such a decision as that, I for one say that it ought not and never can be respected. The Territories belong to us; they are ours; that is to say, they are the property of the thirty States of the Union; and we, as the representatives of those thirty States, have the right to exercise all that authority and jurisdiction which ownership carries with it.

Sir, there are some questions that do not admit of lengthened discussion. This is one of them. The mere statement is sufficient to carry conviction with it. And I am rejoiced to hear gentlemen acknowledge that if the Constitution is there we are under its shield. The South wants no higher ground to stand upon. The



gentlemen have put us upon high ground by the admission that their only means of putting their claims above ours is to deny the existence of the Constitution in California and New Mexico. The Senator from Massachusetts, I say, in part indorsed the proposition. He qualified it, however, by saying that all the fundamental principles of that instrument must be regarded as having application to the Territories. Now, is there a more fundamental principle than that the States of which this Federal Union is composed have a community of interest in all that belongs to the Union in its federative character? And that the territory of the United States belongs to the Union in that capacity is declared by the Constitution, and that there shall be, in all respects, perfect equality among all the members of the Confederacy. There is no principle more distinctly set forth than that there shall be no discrimination in favor of one section over another, and that the Constitution shall have no half-way operation in regard to one portion of the Union, while it shall have full force and effect in regard to another portion.

I will not dwell upon this. I will only listen, if gentlemen choose to go on, in order to discover by what ingenuity they can make out their case. It is a mere assumption to say that the Constitution does not extend to the Territories. Let the gentlemen prove their assumption. I hold the course of the whole of this debate to be triumphant to us. We are placed upon higher ground; we have a narrower question to defend; and it will be understood by the community that we are nonsuited only by a denial of the existence of the Constitution in the Territories.

MR. WEBSTER. The honorable Senator from South Carolina alludes to some decision of the United States courts as affirming that the Constitution of the United States does not extend to the Territories, and he says that with regard to—

MR. CALHOUN. I hope the gentleman will state my position exactly right. I said I was told a few days since that they had so decided, but that I was incredulous of the fact.

MR. WEBSTER. I can remove the gentleman's incredulity very easily, for I can assure him that the same thing has been decided by the United States courts over and over again for the last thirty years.

MR. CALHOUN. I would be glad to hear the gentleman mention a case in which such a decision was given.

MR. WEBSTER. Upon a few moments' consideration I could mention a number of cases. The Constitution, as the gentleman contends, extends over the Territories. How does it get there? I am surprised to hear a gentleman so distinguished as a strict constructionist affirming that the Constitution of the United States extends to the Territories without showing us any clause in the Constitution in any way leading to that result, and to hear the gentleman maintaining that position without showing us any way in which such a result could be inferred increases my surprise.

One idea further upon this branch of the subject. The Constitution of the United States extending over the Territories and no other law existing there! Why, I beg to know how any government could proceed, without any other authority existing there than such as is created by the Constitution of the United States? Does the Constitution of the United States settle titles to land? Does it regulate the rights of property? Does it fix the relations of parent and child, guardian and ward? The Constitution of the United States establishes what the gentleman calls a confederation for certain great purposes, leaving all the great mass of laws which is to govern society to derive their existence from State enactments. That is the just view of the state of things under the Constitution. And a State or a Territory that has no law but such as it derives from the Constitution of the United States must be entirely without any State or Territorial government. The honorable Senator from South Carolina, conversant with the subject as he must be, from his long experience in different branches of the Government, must know that the Congress of the United States have established principles in regard to the Territories that are utterly repug-

nant to the Constitution. The Constitution of the United States has provided for them an independent judiciary; for the judge of every court of the United States holds his office upon the tenure of good behavior. Will the gentleman say that in any court established in the Territories the judge holds his office in that way? He holds it for a term of years, and is removable at Executive discretion. How did we govern Louisiana before it was a State? Did the writ of habeas corpus exist in Louisiana during its Territorial existence? Or the right to trial by jury? Who ever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one. And I do not believe that there is any new light now to be thrown upon the history of the proceedings of this Government in relation to that matter. When new territory has been acquired it has always been subject to the laws of Congress, to such law as Congress thought proper to pass for its immediate government, for its government during its territorial existence, during the preparatory state in which it was to remain until it was ready to come into the Union as one of the family of States.

The honorable Senator from South Carolina argues that the Constitution declares itself to be the law of the land, and that therefore it must extend over the Territories. "The land," I take it, means the land over which the Constitution is established, or, in other words, it means the States united under the Constitution. But does not the gentleman see at once that that argument would prove a great deal too much? The Constitution no more says that the Constitution itself shall be the supreme law of the land than it says that the laws of Congress shall be the supreme law of the land. It declares that the Constitution and the laws of Congress passed under it shall be the supreme law of the land.

Mr. CALHOUN. The laws of Congress made in pursuance of its provisions.

Mr. WEBSTER. Well, I suppose the revenue laws are made in pursuance of its provisions; but, according to the gentleman's reasoning, the Constitution extends over the Territories as the supreme law, and no legislation on the subject is necessary. This would be tantamount to saying that the moment territory is attached to the United States, all the laws of the United States, as well as the Constitution of the United States, become the governing will of men's conduct, and of the rights of property, because they are declared to be the law of the land—the laws of Congress being the supreme law as well as the Constitution of the United States. Sir, this is a course of reasoning that can not be maintained. The Crown of England often makes conquests of territory. Who ever heard it contended that the constitution of England, or the supreme power of Parliament, because it is the law of the land, extended over the territory thus acquired, until made to do so by a special act of Parliament? The whole history of colonial conquest shows entirely the reverse. Until provision is made by act of Parliament for a civil government, the territory is held as a military acquisition. It is subject to the control of Parliament, and Parliament may make all laws that they deem proper and necessary to be made for its government; but until such provision is made, the territory is not under the dominion of English law. And it is exactly upon the same principle that territories coming to belong to the United States by acquisition or by cession, as we have no *jus corone*, remain to be made subject to the operation of our supreme law by an enactment of Congress.

Mr. CALHOUN. I shall be extremely brief in noticing the arguments of the honorable Senator from Massachusetts, and, I trust, decisive. His first objection is, as I understand it, that I show no authority by which the Constitution of the United States is extended to the Territories. How does Congress get any power over the Territories?

Mr. WEBSTER. It is granted in the Constitution in so many words—the power to make laws for the government of the Territories.

Mr. CALHOUN. Well, then, the proposition that the Constitution does not extend to the Territories is false to that extent. How else does Congress obtain the legisla-

tive power over the Territories? And yet the honorable Senator says I assign no reason for it. I assigned the strongest reason. If the Constitution does not extend there, you have no right to legislate or to do any act in reference to the Territories.

Well, as to the next point. The honorable Senator states that he was surprised to hear from a strict constructionist the proposition that the Constitution extends itself to the Territories. I certainly never contended that the Constitution was of itself sufficient for the government of Territories without the intervention of legislative enactments. It requires human agency everywhere; it can not extend itself within the limits of any State, in the sense in which the gentleman speaks of it. It is, nevertheless, the supreme law, in obedience to which, and in conformity with which, all legislative enactments must be made. And the proposition that the Constitution of the United States extends to the Territories so far as it is applicable to them is so clear a proposition that even the Senator from Massachusetts, with his profound talent, can not disprove it. I will put the case of some of the negative provisions of the Constitution. Congress can make no law concerning religion, nor create titles of nobility. Can you establish titles of nobility in California? If not, if all the negative provisions extend to the Territories, why not the positive? I do not think it necessary to dwell any longer upon this point.

MR. WEBSTER. The precise question is whether a Territory, while it remains in a territorial state, is a part of the United States. I maintain it is not. And there is no stronger proof of what has been the idea of the Government in this respect than that to which I have alluded and which has drawn the honorable member's attention. Now, let us see how it stands. The judicial power of the United States is declared by the Constitution to be "vested in one Supreme Court and in such inferior courts as Congress shall from time to time ordain and establish." The whole judicial power, therefore, of the United States is in these courts. And the Constitution declares that "all the judges of these courts shall hold their offices during good behavior." Then the gentleman must admit that the legislation of Congress heretofore has not been altogether in error; that these Territorial courts do not constitute a part of the judicial power of the United States, because the whole judicial power of the United States is to be vested in one Supreme Court and in such inferior courts as Congress shall establish, and the judges of all these courts are to have a life tenure under the law; and we do not give such tenure, nor never did, to the judges of these Territorial courts. That has gone on the presumption and true idea, I suppose, that the Territories are not even part of the United States, but are subject to their legislation. Well, where do they get this power of legislation? Why, I have already stated that the Constitution says "the Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States," and it is under that clause only that the legislation of Congress in respect to the Territories has been conducted. And it is apparent from our history that no other provision was intended for Territorial Government, inasmuch as it is highly probable, I think certain, that no acquisition of foreign territory was ever contemplated.

And again, there is another remarkable instance. The honorable gentleman and his friends who act with him on these subjects hold that the power of internal improvement within the United States does not belong to Congress. They deny that we can pass any law for internal improvements within any State of this Union, while they all admit that the moment we get out of the States into a Territory we can make just as much improvement as we choose. There is not an honorable gentleman on that side of the Chamber who has not, time and again, voted money out of the public Treasury for internal improvements out of the Union in Territories, under the conception that, under that provision of the Constitution to which I have referred, they do not constitute any portion of the Union—that they are not parts of the Union.

Sir, there is no end to illustrations that might be brought upon this subject. Our history is full of them. Our history is uniform in its course. It began with the acquisition of Louisiana. It went on after Florida became a part of the Union. In all cases, under all circumstances, by every proceeding of Congress on the subject, and by all judicature on the subject, it has been held that Territories belonging to the United States were to be governed by a constitution of their own, framed by a convention, and in approving that constitution the legislation of Congress was not necessarily confined to those principles that bind it when it is exercised in passing laws for the United States itself. But, sir, I take leave of the subject.

MR. CALHOUN. Mr. President, a few words. First, as to the judiciary. If Congress has decided the judiciary of the Territories to be part of the judiciary under the United States, Congress has decided wrong. It may be that it is a part of the judiciary of the United States, though I do not think so.

MR. WEBSTER (in his seat). Nor I.

MR. CALHOUN. Again, the honorable gentleman from Massachusetts says that the Territories are not a part of the United States—are not of the United States. I had supposed that all the Territories were a part of the United States. They are called so.

MR. WEBSTER (in his seat). Never.

MR. CALHOUN. At all events, they belong to the United States.

MR. WEBSTER (still in his seat). That is another thing. The colonies of England belong to England, but they are not a part of England.

MR. CALHOUN. Whatever belongs to the United States they have authority over, and England has authority over whatever belongs to her. We can have no authority over anything that does not belong to the United States, I care not in what light it may be placed.

But, sir, as to the other point raised by the Senator—internal improvements. The Senator says there is not a member on this side of the Chamber but what has voted to appropriate money out of the public Treasury for internal improvements in the Territories. I know that a very large portion of the gentlemen on this side have voted to appropriate money out of the public Treasury for improvements in Territories, upon the principle of ownership; that the land in the Territories in which improvements are made has an increased value in proportion to the sums appropriated, and the appropriations have in every case been given in alternate sections. But many gentlemen here have utterly denied our right to make them under that form. But that question comes under another category altogether. It comes under the category whether we have a right to appropriate funds out of the common Treasury at all for internal improvements.

Sir, I repeat it, that the proposition that the Constitution of the United States extends to the Territories is so plain a one and its opposite—I say it with all respect—is so absurd a one that the strongest intellect can not maintain it. And I repeat that the gentlemen acknowledge, by implication, if not more than that, that the extension of the Constitution of the United States to the Territories would be a shield to the South upon the question in controversy between us and them. I hold it to be a most important concession. It narrows the ground of controversy between us. We then can not be deprived of our equal participation in those Territories without being deprived of the advantages and rights which the Constitution gives us. (Appendix to Cong. Globe, vol. 20, pp. 272-274.)

THE PROCEEDINGS IN CONGRESS DURING THE PASSAGE OF THE BILL PROVIDING FOR THE PAYMENT OF THE PURCHASE PRICE OF ALASKA, WHEREIN THE HOUSE REQUIRED THE SENATE AND EXECUTIVE TO RECOGNIZE AND RESPECT THE RIGHT OF THE HOUSE TO PARTICIPATE IN THE DETERMINATION OF THE QUESTION WHETHER OR NOT A CESSION OF FOREIGN TERRITORY TO THE UNITED STATES SHALL BE ASSENTED TO BY THE SOVEREIGN PEOPLE OF THE UNITED STATES.

In my report on "The status, etc.," submitted February 12, 1900,<sup>1</sup> reference was made to the proposition that, in order to complete the cession of territory from another sovereign to the United States, it is necessary to secure the assent of the sovereign of the United States to such transfer; that sovereignty in the United States is vested in the people, and the sovereign will of the people is to be declared by the Congress and can not be declared by the military authority nor the treaty-making power of this Government. The House of Representatives has always asserted its high prerogative respecting this matter and insisted upon its being recognized. It would seem that ample justification for such insistence is found in propounding the question, How can the will of the sovereign people of the United States be ascertained except by the action of Congress, in which the House must participate?

There is also an additional reason, of great importance, why the House of Representatives should participate in determining whether or not a proposed cession of territory should be accepted, to which attention is directed by a discussion now in progress in this country. It is asserted by no inconsiderable number of people that a treaty providing for the cession of foreign territory to the United States being ratified by the Senate, signed by the Executive, ratifications exchanged and the treaty proclaimed, *ipso facto*, the revenue laws of the United States are so modified that the products of the territory to which the treaty relates are to be admitted into the ports of the United States free from custom duties. The Constitution provides (art. 1, sec. 7, cl. 1):

All bills for raising revenue shall originate in the House of Representatives.

In respect of this provision of the Constitution, The Federalist says (No. 58, pp. 269-270, ed. 1852):

The House of Representatives can not only refuse, but they alone can propose, the supplies requisite for the support of Government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the Government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance and for carrying into effect every just and salutary measure.

<sup>1</sup>Ante, page 37.

Is not this great power of the House of Representatives rendered nugatory if the treaty-making power, in which the House does not participate, may exempt from the operations of the revenue laws originating in the House the products of territory which the House contemplated and declared should be subject to said laws?

The fact that such modification of the revenue laws arises by implication from the cession or is incidental thereto, does not avoid the force of this important provision of the Constitution. If the treaty-making power may properly exercise this authority inferentially or incidentally, it may exercise it directly and enter into such reciprocity treaties respecting trade and commerce with foreign countries as it sees fit to do, and the House of Representatives is powerless to prevent such action.

The report on "The status, etc.," submitted February 12, 1900, contained the following:

The subject was again before Congress when the bill making appropriations for the purchase of Alaska was under consideration, and was disposed of by the House accepting from a conference committee a preamble reciting that the stipulations of the treaty "that the United States shall accept of such cession \* \* \* can not be carried into full force and effect except by legislation, to which the consent of both Houses of Congress is necessary." (15 U. S. Stat., 198.)

The report of the conference committee was adopted by the Senate and House of Representatives, and thereby Congress declares that the cession of territory to the United States must be effected by legislative enactment; that is, the assent of both Houses of Congress must be secured.

The House of Representatives through all our history has guarded with vigilance its constitutional right to participate in the declaration of the will of the sovereign people of the United States in all matters which by the Constitution are subjected to the legislative branch of this Government. A review of all the instances in which the House has asserted this right would constitute a volume; therefore, I select the instance of Alaska, for the proceedings therein contain reviews of many former instances.

When the bill making an appropriation for the purchase price of Alaska was reported for passage, Mr. Loughridge, of Iowa, moved to amend by inserting the following as a substitute:

Whereas the President of the United States, on the 30th of March, 1867, entered into a treaty with the Emperor of Russia, by the terms of which it was stipulated that, in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia the sum of \$7,200,000 in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas the subjects thus embraced in the stipulations of said treaty are among the subjects which, by the Constitution of the United States, are submitted to the power of Congress, and over which Congress has exclusive jurisdiction; and it being for such reason necessary that the consent of Congress should be given to the said treaty before the same can have full

force and effect, having taken into consideration the said treaty and approving of the stipulations therein. To the end that the same may be carried into effect: Therefore,

SEC. 1. *Be it enacted*, That the assent of Congress is hereby given to the stipulations of said treaty. (Cong. Globe, 2d sess. 40th Cong., part 4, p. 3621.)

Mr. Loughridge supported his proposal with marked ability, advancing with other arguments the following:

I shall leave the question of the physical character of this territory and its value to others better informed than I am on that question. There is another question involved of far more importance, one before which the question of the value of this territory sinks into utter insignificance, a question more important than which has never been discussed within these walls. That question, sir, is in relation to the rights, the powers, and the constitutional prerogatives of this House of Representatives as one of the departments of this Government. That question is directly involved in this case, and to that I propose to direct my remarks; and so far as that question is concerned it makes no difference whether this territory is a worthless, frozen waste of eternal ice and snow or whether it is a fertile, blooming, fruitful garden. Upon this question the chairman of the Committee on Foreign Affairs has said but little in his remarks in favor of this bill, and I say in all candor that I am unable to gather from the report of the committee or from the speech of the chairman what the opinion of the committee or of the chairman is in relation to the extent of the treaty-making power as vested in the President or in relation to the constitutional rights and prerogatives of the House in connection with treaties.

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An attempt is being made, through the means of the treaty-making power, to concentrate almost all of the power of this Government in the hands of the President, subject only to the advice and consent of the Senate. And this proposition is, if adopted, a long step in that direction. I hesitate not to say, sir, that if, without any explanation, disaffirmance, or protest, we make this appropriation, we shall, so far as this House can do it, have surrendered practically all the power of the Government into the hands of the treaty-making department and reduced this House to the position of an involuntary agent of that power, with no discretion but to carry out its expressed will. That we are rapidly drifting in that direction it seems to me must be apparent to the most casual observer. By substituting a foreign government or an Indian tribe in place of this House, on the principle claimed by the Executive, there is nothing within the whole scope of the legislative powers of the Government that can not be done without the consent or intervention of this House. I defy any gentleman to point out a single act of legislation that can not be done through and by the treaty-making power if we admit that power to the extent claimed by the Executive.

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From the course of the Executive in this case it is clearly his opinion and that of his advisers that Congress has in no case any discretion in relation to passing the laws necessary to carry treaties into effect; but that when a treaty is made by the President and ratified by the Senate it is the duty of this House then to recognize it as the supreme law of the land and to pass all laws necessary to carry it into effect, whatever may be the nature or character of its stipulations and regardless of the views of Congress as to its expediency or its bearing upon the public good. That the President has the power, with the consent of the Senate, to purchase territory from foreign powers to any extent and annex such territory to and make it a part of this Government and make all its inhabitants citizens of the United States, and to appropriate for such purpose such sums of money as he may see fit; that this may be done by secret treaty, without any authority or consent from Congress, and that after such treaty is consummated Congress has no control whatever over the matter, but must, without question or hesitation, appropriate the money required and pass all necessary

laws to carry the treaty into effect; and there is no limit to the extent of this power. It may extend to the purchase of the whole continent, British America, Mexico, West India Islands, and thus insure the destruction of our Government.

Sir, as one of the Representatives of the people upon this floor I here enter my earnest and solemn protest against this monstrous assumption—this fatal political heresy. If this doctrine is to prevail, then, sir, this House is but a useless appendage to the Government, and for all practical purposes might as well be abolished. Can any gentleman upon this floor go home to his constituents and tell them that he has agreed to the surrender of his rights, his power, and his dignity as a member of this House, and the surrender of the constitutional rights of the people through their Representatives upon this floor to be heard upon as important questions as are involved in the unlimited extension of the jurisdiction of our Government and the unlimited increase of our already crushing debt?

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I hold the true doctrine and the law in relation to the treaty-making power to be that which the House declared in 1795; that while the treaty-making power is vested in the President, by and with the advice and consent of the Senate, and while the House has no agency in making treaties, yet when a treaty contains stipulations in relation to subjects which by the Constitution are submitted to Congress, the treaty must depend for its execution upon laws to be passed by Congress, and that in all such cases it is the prerogative and the duty of Congress to deliberate, to take into view all of the considerations bearing upon the question, and to act upon it according to their judgment of the interests of the Government and the wishes of the people, and either pass the necessary laws, and thus give the treaty vitality and effect, or refuse to pass them, as in their opinion the public good requires.

Take the case now before the House: The President, with the advice and consent of the Senate, made a treaty of purchase with Russia whereby that power agreed to transfer to the United States certain territory, in consideration of which territory the United States agrees to pay Russia \$7,200,000 in gold. This treaty was ratified by both powers and ratifications exchanged. And Congress is now asked to enact a law for the appropriation of the necessary money and to carry the treaty into effect. Now, if the doctrine I have referred to, and to which I object, is correct, and if without any legislation by Congress the treaty is effective, clothed with vitality and the law of the land, then no laws of Congress are necessary, and the treaty itself is a sufficient law for the appropriation of the money. Sir, the application to Congress for the passage of a law for the appropriation of the money and to carry the treaty into effect is a clear and conclusive demonstration of the error and the unsoundness of the doctrine claimed by those who regard this negotiation as perfected and binding without the action of Congress.

\* \* \* \* \*

I trust, sir, that but few will be found upon this floor willing to consent to a doctrine so dangerous, willing to yield up the authority and prerogatives of this House vested in it by the Constitution of the country, and which it has always heretofore persistently maintained. But there is another question involved in this case in addition to that of the appropriation of the money, and one of equal importance and interest, and that is as to the power of the President, with the advice and consent of the Senate, and without the consent of Congress, or of the people of the United States, by treaty, to extend the area of our Government and bring into its jurisdiction foreign countries and foreign peoples. This power I deny. I do not claim that the Constitution has vested this power in Congress in express terms. As I read that instrument it is silent on the subject. Such power is not by that instrument given to any department of the Government in express terms. I do not wish to be understood as denying this power to the Government. By the laws of nations all governments have the right to add to their domain by purchase and by conquest, and I



suppose that our Government has this right, by the laws of nature, the same as the right of self-defense—the right to do what is necessary for its own existence.

Jefferson, I believe, placed the power to purchase Louisiana upon the law of necessity, of self-preservation. Many of our greatest statesmen have placed it upon the clause in the Constitution giving Congress the power to admit new States into the Union. But from whatever source the power is derived, I deny that it belongs to or is vested in the treaty-making department, but that it belongs strictly to Congress. (Congressional Globe, second session, Fortieth Congress, part 4, pp. 3621, 3622, 3623.)

Mr. Meyers, of Pennsylvania, said:

I will not for a moment admit that the action of the President and Senate binds us to complete any purchase of territory whatever. If the treaty-making power extended thus far we should be required to accept a country although inhabited by millions of slaves, or thousands of miles distant, though its religion were inclosed in the Koran, or its people dwelt at the feet of polygamy and barbarism. If Alaska could be thus acquired, why not China or Japan? To state the proposition that the House of Representatives need not be consulted in such an event is its own best refutation. It is unnecessary to trouble the committee with precedents. The House of Representatives asserted its right in this regard, even against the protest of Washington, as early as 1794, in relation to the British treaty, and has in no instances that I am aware of surrendered this right. Nor is the objection solely that a grant of money must be made by law before the treaty can be carried to its perfect consummation. It is for the people, through their Representatives, to say whether from locality or for any cause an acquisition of territory is subversive, in their opinion, of the interests or principles of the Government. (*Ib.*, p. 3661.)

Mr. Ferriss, of New York, called attention to the fact that the House of Representatives had always theretofore insisted upon the necessity of concurrent action by both Houses of Congress in the acquisition of territory by the United States, and carefully reviewed the history of each acquisition. (*Ib.*, p. 3663 et seq.)

The further debate in the House on the propositions contained in the substitute offered by Mr. Loughridge is to be found in the appendix to the Congressional Globe, second session Fortieth Congress, part 5. Arguments in support of the substitute were delivered by Paine, of Wisconsin (p. 305); Shellabarger, of Ohio (p. 377); Price, of Iowa (p. 380); Washburn, of Wisconsin (p. 392); Butler, of Massachusetts (p. 400); Delano, of Ohio (p. 452); Cullom, of Illinois (p. 473), and Williams, of Pennsylvania (p. 485). Arguments in opposition to the substitute were offered by Pouyn, of New York (p. 382); Banks, of Massachusetts (p. 385); Maynard, of Tennessee (p. 403); Stevens, of Pennsylvania (p. 421), and Orth, of Indiana (p. 420).

The addresses in support of the substitute are largely historical reviews of the instances and attendant circumstances wherein the House of Representatives has insisted upon the recognition of the rights asserted in the substitute. It is therefore impossible to abridge them or adequately present the arguments advanced in abbreviated form. The address of Mr. Cullom, then a Representative from Illinois and now a Senator from that State, sets forth the general argu-

ment in the form most suitable for quotation. Mr. Cullom said (App., p. 473):

Is the treaty perfect and complete, or is it unfinished and inchoate and dependent upon the very question we are considering, namely, whether we shall make the appropriation?

I fully understand the fact that Congress can, by mere force of its own will, refuse to make the appropriation; but the question is can it do so consistent with the honor of the nation and its constitutional prerogatives? If the treaty is perfect and complete, so that the nation is bound and may be held responsible by the Russian Government in case of failure to make the appropriation and payment, then I should vote the appropriation. But it seems to me that it is not. The Russian Government knew that the power to raise revenue rested with Congress. There can be no pretense that that Government was ignorant of the provisions of our Constitution. It was well known that Congress would have to be invoked, and that that branch of the Government was free to act as its members might choose. It has been the settled doctrine of this country ever since 1794 that Congress has the right to deliberate and carry out or refuse to carry out a treaty as in their judgment might be for the public good, when such treaty contained stipulations which depended upon Congress for their execution. The resolution adopted by the House of Representatives of the Fourth Congress asserted that doctrine, and it has been adhered to ever since. I give the resolution:

*“Resolved, That it being declared by the second section of the second article of the Constitution that ‘the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the Senators present concur,’ the House of Representatives do not claim any agency in making treaties, but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or in expediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good.”*

This resolution is explicit and clear in its declaration that when a treaty stipulates regulations on any subject which by the Constitution is submitted to the power of Congress, in such cases Congress has the right to deliberate on the expediency or in expediency of carrying such treaty into effect.

Now, Mr. Speaker, I submit that if Congress has the right to deliberate and vote and pass whatever law may be necessary to carry out a treaty, where by its terms legislation is necessary, as in this case, an appropriation being necessary before the terms of the contract can be complied with in paying the money for the land, or to refuse to enact such legislation, is it not the inevitable conclusion to which you must come that such a treaty does not become the supreme law of the land until such legislation is had, and that it is a contract entered into between the parties, but not binding upon the Government because it remains in an inchoate condition? Of what consequence is the right to deliberate if after all we are bound at last to come to but one conclusion, and that to do whatever may be necessary to carry out the treaty? The resolution of 1794 is nonsense if it simply means the House may consider and then vote as the President and Senate desire, or even if it means that we may deliberate and then violate a contract which is claimed to be the supreme law of the land, and to be such a contract as to give the other party the right to demand reparation for a violation. The doctrine of the Constitution and of the resolution of 1794 amounts to more than a declaration of arbitrary power; it amounts to a declaration, in my judgment, that a treaty which requires the action of Congress to carry it into effect does not become the supreme law of the land until such action by Congress is had.

Justice McLean, in my judgment, took the correct view of the matter in his opinion found in 5 McLean's Reports, page 344. He say that—

"A treaty is the supreme law of the land only when the treaty-making power can carry it into effect. A treaty which stipulates for the payment of money undertakes to do that which the treaty-making power can not do; therefore the treaty is not the supreme law of the land. To give it the effect the action of Congress is necessary. And in this action the Representatives and Senators act on their own judgment and responsibility, and not on the judgment and responsibility of the treaty-making power. A foreign government may be presumed to know the power of appropriating money belongs to Congress. No act of any part of the Government can be held to be a law which has not all the sanctions to make it law."

So, according to this decision, the treaty with Russia for the purchase of Alaska is not the supreme law of the land because it undertakes to do that which it can not do. Justice Marshall also entertained the same opinion. In 2 Peters, page 258, he says:

"Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the Legislature must execute the contract before it can become a rule for the court."

Then, if the treaty has not yet become the supreme law of the land, and if we have the right to deliberate and are left perfectly free to make the appropriation or refuse it, then the question recurs, What ought we do in reference to this appropriation? In other words, ought we to purchase, pay for, and own this territory now? I do not agree to the declaration that the territory is worthless. My opinion is that some day the territory will be valuable. But do we want it now, and are we in a condition now to begin a policy of acquisition?

The House adopted the substitute; the bill was passed and sent to the Senate. That body amended the bill by striking out the substitute and returned it to the House. The House refused to concur in the amendment, and a conference was ordered. The outcome of the controversy was that the Senate receded, the position of the House was sustained, the bill passed both Houses, and was signed by the President, as follows:

Whereas the President of the United States, on the thirtieth of March, eighteen hundred and sixty-seven, entered into a treaty with the Emperor of Russia, and the Senate thereafter gave its advice and consent to said treaty, by the terms of which it was stipulated that, in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia the sum of seven million two hundred thousand dollars in coin; and

Whereas it was further stipulated in said treaty that the United States *shall accept of such cession*, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and

Whereas said stipulations can not be carried into full force and effect except by legislation to which the consent of both Houses of Congress is necessary: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, appropriated, from any money in the Treasury not otherwise appropriated, seven million and two hundred thousand dollars in coin, to fulfil stipulations contained in the sixth article of the treaty with Russia, concluded at Washington on the thirtieth day of March, eighteen hundred and sixty-seven. (15 U. S. Stat., 198.)

**THE POSITION TAKEN BY THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THIS GOVERNMENT RESPECTING TERRITORY SUBJECT TO THE JURISDICTION OF THE UNITED STATES BUT OUTSIDE OF THE STATES OF THE UNION, AND THE RELATION SUSTAINED BY SUCH TERRITORY TO THE TARIFF LAWS AND STATUTES OF SIMILAR CHARACTER.**

The original law for the collection of customs, passed July 31, 1789, divided the States into collection districts, but entirely neglected the territory outside of the original States. The only collector in the Western territory was at Louisville, "whose authority shall extend over all waters, shores, and inlets included between the rapids and the mouth of the Ohio River, on the southeast side thereof." (Act of July 31, 1789, 1 U. S. Stats., p. 34.)

The northwest or territorial bank of the Ohio was left unprovided for. Vermont was left without a customs-house until it was admitted as a State, as was also Tennessee; but as soon as either was admitted a port was established therein, evidently out of regard for the equality of commercial privileges guaranteed the States by the Constitution. It was not until 1799 that the customs laws of the United States were put in force in any part of the Northwest Territory. (Act of March 2, 1799, sec. 17; see 1 U. S. Stats., pp. 637, 638.)

If the result of this omission was to make unlawful all and any importations from Canada into the Northwest Territory, then certainly the territory was not considered as benefited by the Constitution, for one of the benefits most jealously guarded by the several States was equal privileges in foreign commerce.

Historically we know that Vermont and the Northwest Territory carried on extensive trade with Canada, and it is seemingly incontestable that the idea prevailed in those days that prior to admission as a State, or the extension of the customs laws in 1799, said territory was no more bound by the tariff requirements of the Constitution than it was benefited thereby.

Attention is also directed to the action taken by the First Congress in the instances of North Carolina and Rhode Island. The President informed Congress on the 28th of January, 1790, that North Carolina had ratified the Constitution on November 21, 1789; and, again, he informed Congress on the 1st day of June, 1790, that Rhode Island had ratified the Constitution on May 29, 1789. Prior to receiving these notifications Congress had enacted two revenue measures, to wit, "an act for laying duties on goods, wares, and merchandises imported into the United States," also, "an act imposing duties on tonnage." Although by such act of ratification both North Carolina and Rhode Island became incorporated in the Union of States, Congress saw fit to pass acts extending the provisions of the previous revenue measures over the territory included in North Carolina and Rhode Island. (See 1 Stat., pp. 99, 126.)

## THE TARIFF IN LOUISIANA.

The treaty for the purchase of Louisiana was formulated April 30, 1803; approved by the Senate in October, 1803; ratified by the President and exchanged October 21, 1803.

On October 25, 1803, Gallatin, as Secretary of the Treasury, submitted a "Report on the Finances." Therein he said:

The existing surplus revenue of the United States will, as has been stated, be sufficient to discharge \$600,000 of that sum, and it is expected that the net revenue collected at New Orleans will be equal to the remaining \$200,000. That opinion rests on the supposition that Congress shall place that port on the same footing as those of the United States, so that the same duties shall be collected there on the importation of foreign merchandise as are now by law levied in the United States, and that no duties shall be collected, either on the exportation of produce or merchandise, from New Orleans to any other place, nor on any articles imported in the United States from the ceded territories or into those territories from the United States. (Vol. 1, Reports on Finances, p. 265, U. S. Treasury.)

It is manifest that Gallatin considered that *Congress must legislate* in order that "no duties shall be collected \* \* \* on any articles imported in the United States from the ceded territories or into those territories from the United States."

Gallatin wrote to W. C. Claiborne, governor of Mississippi Territory, as follows:

WASHINGTON, 31st October, 1803.

DEAR SIR: You will receive by this mail instructions from the proper department for taking possession of Louisiana and for the temporary government of the province. It is understood that the existing duties on imports and exports, which by the Spanish laws are now levied within the province, will continue until Congress shall have otherwise provided. By next mail I expect to be able to write you an official letter on that subject which will probably reach you before you can act upon it. (Writings of Gallatin, vol. 1, p. 167.)

Thereafter H. R. Trist, United States collector at Fort Adams, was designated as collector of the port of New Orleans. On November 14, 1803, Gallatin, as Secretary of the Treasury, issued an order directed to Mr. Trist, wherein, after informing him of his new appointment, he instructed him as follows:

You will also be pleased to observe—

First. That the taxes and the duties to be collected under your direction are precisely the same which by the existing laws or regulations of Louisiana were demandable under the Spanish Government at the time of taking possession.

Second. That in those taxes and duties are included specially those on imports, exports, transfer of shipping, etc., which were collected under those officers whose powers are vested in you, and generally all other taxes and duties which made part of the general revenue of the province.

\* \* \* \* \*

Fourth. That you are only to secure or collect duties accruing after possession of same by the United States.

\* \* \* \* \*

Tenth. That until otherwise provided for, the same duties are to be collected on the importation of goods in the Mississippi district from New Orleans and vice versa as heretofore. (Gallatin to Trist, November 14, 1803. See Book G, January 1, 1803, to December 31, 1808, Collectors of Small Ports, Office Secretary of the Treasury.)

On February 24, 1804, Congress passed an act putting in force in the Territory of Louisiana the laws of the United States regulating duties on imports and tonnage. (2 U. S. Stats., 251.)

Congress accepted the doctrine acted upon by the Jefferson Administration, and included in said act the following:

SEC. 3. *And be it further enacted*, That so much of any law or laws laying any duties on the importation into the United States of goods, wares, and merchandise from the said territories (or allowing drawbacks on the importation of the same from the United States to the said territories), or respecting the commercial intercourse between the United States and the said territories, or between the several parts of the United States through the said territories, which is inconsistent with the provisions of the preceding section, *be, and the same hereby is, repealed*; and all duties on the exportation of goods, wares, and merchandise from the said territories, as well as all duties on the importation of goods, wares, and merchandise into the said territories, on the transfer of ships or vessels, and on the tonnage of vessels, other than those laid by virtue of the laws of the United States, shall, from the time when this act shall commence to be in force, *cease and determine*: *Provided, however*, That nothing herein contained shall be construed to affect the fees and other charges usually paid in the said territories on account of pilotage, wharfage, or the right of anchorage by the levy of the city of New Orleans, which several fees and charges shall, until otherwise directed, continue to be paid and applied to the same purposes as heretofore. (2 U. S. Stats., sec. 3, p. 255.)

Section 12 of said act provided "that this act shall commence thirty days after the passing thereof." (Id., p. 254.)

Thereupon Gallatin, Secretary of the Treasury, issued the following:

[Circular.]

TREASURY DEPARTMENT, *February 28, 1804.*

SIR: As it may be some time before you can be furnished with a printed copy of an act entitled "An act for laying and collecting duties on imports and tonnage within the territories ceded to the United States by the treaty of the thirtieth of April, one thousand eight hundred and three, between the United States and the French Republic, and for other purposes," passed on the 24th of the present month, I have deemed it proper, for your government therein, to inform you that by the third section of the said act so much of any law or laws imposing duties on the importations into the United States of goods, wares, and merchandise from New Orleans, which is the only port of entry in the said territories, has been repealed. But as the act in question does not commence to be in force until thirty days after its date, articles which have been or may be thus imported before the 25th of March ensuing *must pay the same duties as heretofore*.

I am, very respectfully, sir, your obedient servant,

A. GALLATIN.

(Book G, January 1, 1803, to December 31, 1808, Collectors of Small Ports, Office Secretary of Treasury.)

Regarding the construction of this repealing act Gallatin determined as follows:

TREASURY DEPARTMENT, *March 31, 1804.*

ROBERT PURVEANCE, Esq.,  
*Collector, Baltimore.*

SIR: In answer to your letter of the 29th instant I will only observe that, without wishing to establish a principle applicable to other places, it seems proper that the

law repealing duties on goods imported from New Orleans should receive a liberal construction, and that no duties should be collected which are not in the most liberal sense of the law justly demandable.

In the case of the *Comet*, the day of arrival in the district where the goods are entered appears to be the proper date of importation. If, therefore, the vessel arrived in the district of Baltimore subsequent to the 25th of March, I do not think that the goods which, by law, are exonerated from payment of duty if imported after that day into the United States should be charged with such duty.

I am, very respectfully, sir, your obedient servant,

ALBERT GALLATIN.

(G, January 1, 1803, to December 31, 1808, Collectors of Small Ports, Office Secretary of Treasury.)

Jefferson claimed West Florida was included in the Louisiana purchase. Inasmuch as Congress had extended the tariff and navigation laws of the United States over the "territories ceded to the United States" by said treaty, it was necessary for him to accord the benefits of said laws to the products and shipping of West Florida; but his Secretary of the Treasury instructed the collector of the port of New Orleans as follows:

You will therefore consider all the said territory, whether on Lake Pontchartrain or on the Mississippi, in the same light as that part of it which lies east of the Pontchartrain Lake; that is to say, that with the exception prescribed in the two first rules laid down in my letter of the 27th ultimo, in relation to the produce and shipping of the said disputed territory, you are to consider Baton Rouge and other settlements now in possession of Spain, whether on the Mississippi, Iberville, the lakes, or the sea coast, *as foreign ports*. (See letter Gallatin to Trist, March 19, 1804, Book G, January 1, 1803, to December 31, 1808, Collectors of Small Ports, Office Secretary of Treasury.)

In December, 1806, Gallatin, as Secretary of the Treasury, submitted a "Report on the Finances." Included therein was his estimate of the probable revenues to be derived by the Government for the ensuing nine years. In concluding that portion of his report, Gallatin says:

And this must be considered as a very moderate computation, *since it does not include the revenue derived from New Orleans*. (Vol. I, Reports on the Finances, p. 335, U. S. Treasury.)

Evidently Gallatin considered that territory as something separate and apart from the United States.

The act of February 24, 1804, entitled "An act for laying and collecting duties on imports and tonnage within the territories ceded to the United States by the treaty of the 30th of April, 1803, between the United States and the French Republic," contained the following:

SEC. 8. *And be it further enacted*, That during the term of twelve years, to commence three months after the exchange of the ratifications of the above-mentioned treaty shall have been notified, at Paris, to the French Government, French ships or vessels, coming directly from France or any of her colonies, laden only with the produce or manufactures of France or any of her said colonies; and Spanish ships or vessels, coming directly from Spain or any of her colonies, laden only with the

produce or manufactures of Spain or any of her said colonies, shall be admitted into the port of New Orleans, and into all other ports of entry which may hereafter be established by law within the territories ceded to the United States by the above-mentioned treaty, in the same manner as ships or vessels of the United States coming directly from France or Spain or any of their colonies, and without being subject to any other or higher duty on the said produce or manufacture than by law now is or shall at the time be payable by citizens of the United States on similar articles imported from France or Spain or any of their colonies, in vessels of the United States, into the said port of New Orleans or other ports of entry in the territories above mentioned; or to any other or higher tonnage duty than by law now is or shall at the time be laid on the tonnage of vessels of the United States coming from France or Spain, or from any of their colonies, to the said port of New Orleans or other ports of entry within the territories above mentioned. (2 U. S. Stats., 253.)

The provisions of this section gave New Orleans an advantage in the importation of French and Spanish products over all the ports of the States of the Union. Such advantage could only be justified upon the theory that the port at New Orleans was without the limits wherein the Constitution required that duties should be uniform.

#### FLORIDA.

The fifteenth article in the Florida treaty was as follows:

The United States, to give to His Catholic Majesty a proof of their desire to cement the relations of amity subsisting between the two nations, and to favor the commerce of the subjects of His Catholic Majesty, agree that Spanish vessels, coming laden only with productions of Spanish growth or manufacture, directly from the ports of Spain or of her colonies, shall be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine, in the Floridas, without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States. During the said term no other nation shall enjoy the same privileges within the ceded territories. The twelve years shall commence three months after the exchange of the ratifications of this treaty.

The advantage over the ports of the several States of the Union thus stipulated for Pensacola and St. Augustine was rendered effective by the act of March 3, 1821, by which the treaty was carried into effect. Section 2 thereof provided that—

The laws of the United States relating to the revenue and its collection, subject to the modification stipulated by the fifteenth article of the said treaty, in favor of Spanish vessels and their cargoes \* \* \* shall be extended to said territories. (3 U. S. Stats., p. 639.)

Here, again, we find both the Executive and the Senate, in exercising the treaty-making power, and the Congress, in legislating for territory not included in the boundaries of the several States, dealing with said territory as being without the area covered by constitutional requirements for uniformity of duties.

It also presents another instance where Congress and the Executive considered it necessary for Congress to act in order that the revenue laws of the United States should be extended to newly acquired territory.



It appears that in 1819, after the Florida treaty had been concluded, but prior to ratification and exchange, a question arose in relation to exports from Florida into New Orleans, and the Treasury Department decided—

That all goods which have been or may be imported from Pensacola before an act of Congress shall be passed erecting it into a collection district, and authorizing the appointment of an officer to reside thereat for the purpose of superintending the collection of duties, will be liable to duty.<sup>a</sup>

This decision of the Treasury Department was called to the attention of the United States Supreme Court in *Fleming et al. v. Page*, 9 How., 603. In regard thereto the court say (617):

This construction of the revenue laws has been uniformly given by the administrative department of the Government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district and authorizing the appointment of a collector were liable to duty. That is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress, and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government.

I am unable to determine why the court say "Florida had, by cession, actually become a part of the United States, and was in our possession," in 1819, since the treaty was not ratified by the Senate until February 22, 1821, and the formal transfer of sovereignty took place on July 17, 1821.

On the argument of *Fleming et al. v. Page*, Daniel Webster, in resisting the force of the decision of the Treasury Department, above set forth, contended that the attorneys for the Government misconceived the reason on which the decision was based. That said decision rested on the fact that at the time the goods were shipped from Pensacola the territory was still subject to the sovereignty of Spain. In support of this contention Webster referred to the opinion of Attorney-General Wirt in the case of the *Olive Branch*, delivered August 20, 1821. (1 Op. A. G., p. 483.)

The court did not sustain Webster in this contention; and they say (p. 617):

It appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government.

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<sup>a</sup> I am unable to secure a copy of this circular, although search has been made therefor at the Treasury Department. The statement of fact and quotation are derived from the circular issued by the Treasury Department on July 29, 1845, with reference to Texas, as set forth in this memorandum under the heading "Texas," *post*, p. 165.)

If this utterance of the court had reference to the opinion of Attorney-General Wirt in the case of the *Olive Branch*, the court overlooked the facts. The decision of the Treasury Department related to certain goods shipped from Pensacola to New Orleans in 1819. The opinion of the Attorney-General was not given until August 20, 1821, and related to goods shipped from St. Augustine to Philadelphia July 14, 1821. It is possible that the full text of the Treasury decision in 1819 or the files in the *Olive Branch* case might straighten out this tangle, which in a measure weakens the otherwise strong case of *Fleming v. Page*.

In trying to cover the ground of this investigation it is necessary to examine the opinion of Attorney-General Wirt in the *Olive Branch* case. That case arose as follows: On July 14, 1821, the *Olive Branch* cleared from the port of St. Augustine, East Florida, and subsequently arrived at Philadelphia, where its cargo was discharged. The owner claimed the cargo was exempt from customs, and the collector at Philadelphia referred the case to the Secretary of the Treasury for decision; he requested and received the opinion of the Attorney-General, not only on the single question presented by the cargo of the *Olive Branch*, but also on the several general questions which would probably arise thereafter. (1 Op. A. G., 483.) The Secretary of the Treasury decided that the cargo of the *Olive Branch* was subject to duties. If I have secured a proper understanding of the opinion of the Attorney-General, the only portion thereof which related to the *Olive Branch* was the opening paragraph, as follows:

I understand that possession of East Florida was not delivered to the United States until the 17th of last month, whereas the *Olive Branch*, as appears by her papers, cleared out from the port of St. Augustine on the 14th of the month. Now, according to the doctrine laid down in the case of the *Fama*, Butler, master, and reported in 5 Robinson, 97, the jurisdiction and authority of the former sovereign continued in full force until possession of the ceded territory had actually passed. If I am right, then, as to the time of delivery, the cargo of the *Olive Branch* was imported into Philadelphia from a foreign port or place, and the case falls completely within the control of the act of the United States to regulate the collection of duties on imports and tonnage, subjecting the vessel, cargo, the master, and owners to all the penalties and forfeitures prescribed by that act for a breach of its several regulations.

If it be true that this is all of the opinion which relates to the cargo of the *Olive Branch*, Mr. Webster was apparently correct in asserting that Attorney-General Wirt, in the special instance before him, based the liability upon the fact that sovereignty over Florida had not been actually and completely transferred to the United States at the time the *Olive Branch* sailed from St. Augustine. In the absence of a statute providing for the contrary it is undoubtedly true that goods imported into the United States from a country to which the sovereignty of the United States has never attached are subject to duties. This is the full extent of the opinion rendered by Attorney-General

Wirt. In said opinion he expressly calls attention to the advisability of deciding "each case on its own circumstances as it shall arise" and the "difficulty and danger, both to individuals and to the public revenue, in an attempt to prejudge them by general rules."

The converse of the proposition set forth in the paragraph above quoted from the opinion of Attorney-General Wirt is by no means established, and there is no evidence that Attorney-General Wirt entertained it. The views expressed by Mr. Wirt during the Cabinet discussions of the controversy between Jackson and Fromentin, indicate the contrary. (5 Adams' Memoirs, pp. 367-373.)

The decision of the court in *Fleming et al. v. Page* is a denial that the test of liability for customs is the sovereignty exercising jurisdiction at the time and place of shipment. Such was the test sought to be established by Mr. Webster in his argument (9 How., 612), but the court refused to adopt it. The court refer with approval to the decision of the Treasury Department in 1819. Said decision explicitly recites the ground on which it stands, and should be allowed to remain there. It is manifestly improper to attempt to base it on a reason apparently not considered by the Secretary of the Treasury in arriving at the conclusion announced.

The Fifteenth Congress (1819) evidently did not consider that the question of liability depended alone on the transfer of sovereignty being accomplished.

While the ratification of the Florida treaty was pending before the Spanish Cortes, the Congress of the United States passed an act providing that "the laws of the United States relative to the collection of revenue \* \* \* shall be extended to said territories." Further provision was made—

That this act shall take effect and be in force whenever the aforesaid treaty providing for the cession of said territories to the United States shall have been ratified by the King of Spain and the ratifications exchanged and the King of Spain *shall be ready to surrender* said territory to the United States. \* \* \* (Act of March 3, 1819, 3 U. S. Stats., pp. 523, 524.)

#### TEXAS.

March 1, 1845 Congress adopted a joint resolution for the annexation of Texas (5 Stat., 797). Subsequently the convention of Texas and the congress of that republic adopted a similar resolution. Thereafter Robert J. Walker, Secretary of the Treasury under President Polk, issued the following order:

TREASURY DEPARTMENT, *July 29, 1845.*

*To collectors and other officers of the customs:*

The President of the United States has received official intelligence that the convention, as well as the congress of the republic of Texas, have sanctioned and adopted the joint resolution of the Congress of the United States of the 1st of March last for the admission of Texas as a State of the Union.

By the twenty-fourth section of the act of Congress of the United States of the 30th of August, 1842, it is provided: "That it shall be the duty of all collectors and other

officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of such revenue laws the decision of the Secretary of the Treasury shall be conclusive and binding upon all such collectors and other officers of the customs." In conformity with this provision of the law it becomes my duty to communicate the views and instructions of this Department upon various important questions arising out of the new relations between Texas and the United States.

First. Although there is now a solemn compact obligatory upon both parties for the admission of Texas as a State of the Union, yet, until further action of the Congress of the United States upon this subject, and instructions founded thereon from this Department, you will collect duties as heretofore upon all the imports from Texas into the United States.

A similar question arose in relation to exports from Florida into New Orleans in 1819, when it was decided by the Treasury Department "that all goods which have been, or may be, imported from Pensacola *before an act of Congress shall be passed erecting it into a collection district* and authorizing the appointment of an officer to reside thereat for the purpose of superintending the collection of duties will be liable to duty." (Book T, October 10, 1843, to February 4, 1848, Circulars, Office Secretary of Treasury.)

On December 29, 1845, Congress passed an act the first section of which was as follows:

That all the laws of the United States are hereby declared to extend to and over, and to have full force and effect within, the State of Texas, admitted at the present session of Congress into the Confederacy and Union of the United States. (9 U. S. Stats., p. 1.)

On December 31, 1845, Congress created a collection district embracing the State of Texas. (9 U. S. Stats., p. 2.)

#### NEW MEXICO AND CALIFORNIA.

The United States acquired title to New Mexico and California by conquest. The conquest of New Mexico was accomplished by the campaign of 1846 (*Leitensdorfer v. Webb*, 20 How., 176); as was also that of California (*Cross v. Harrison*, 16 How., 190).

Although the sovereignty and jurisdiction of the United States permanently attached to this territory, the government of civil affairs therein continued to exact customs according to the schedules, rules, and regulations established by military orders. This action was sustained by the Supreme Court of the United States. (*Cross v. Harrison*, 16 How., 190.)

The treaty of peace with Mexico was ratified and exchanged May 30, 1848, but the officials in charge of customs affairs in California continued until the fall of 1848 to exact customs pursuant to the requirements of the military order issued by direction of the President. This action, also, was sustained by the Supreme Court of the United States. (*Cross v. Harrison*, 16 How., 189.)

On October 7, 1848, Robert J. Walker, Secretary of the Treasury under President Polk, issued the following circular:

TREASURY DEPARTMENT, *October 7, 1848.*

On the 30th of May last, upon the exchange of ratifications of our treaty with Mexico, California became a part of the American Union, in consequence of which various questions have been presented by merchants and collectors for the decision of this Department.

By the Constitution of the United States it is declared that "All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land." By the treaty with Mexico, California is annexed to this Republic, and the Constitution of the United States is extended over that Territory and is in full force throughout its limits. Congress, also, by several enactments subsequent to the ratification of the treaty, have distinctly recognized California as a part of the Union, and have extended over it in several important particulars the laws of the United States.

Under these circumstances the following instructions are issued by this Department:

First. All articles of the growth, produce, or manufacture of California shipped therefrom at any time since the 30th of May last are entitled to admission free of duty into all the ports of the United States.

Second. All articles of the growth, produce, or manufacture of the United States are entitled to admission free of duty into California, as are also all foreign goods which are exempt from duty by the laws of Congress, or on which goods the duties prescribed by those laws have been paid to any collector of the United States previous to their introduction into California.

Third. Although the Constitution of the United States extends to California, and Congress have recognized it by law as a part of the Union and legislated for it as such, yet it is not brought by law within the limits of any collection district, nor has Congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that Territory. Under these circumstances, although this Department may be unable to collect the duties accruing on importations from foreign countries in California, yet, if foreign dutiable goods should be introduced there and shipped thence to any port or place of the United States, they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without the payment of duties.

R. J. WALKER,  
*Secretary of the Treasury.*

It is worthy of attention that while this circular declares that "*By the treaty with Mexico* California is annexed to this Republic, and the Constitution of the United States is extended over that territory and is in full force throughout its limits," the Administration was unwilling to rest its action on that declaration, although if the theory were correct, it afforded ample justification. But the theory was a new one and its projector had been unable to secure recognition for it in the existing Congress. It was diametrically opposed to the theories and practice theretofore prevailing. Therefore the contemplated action was sought to be justified by showing it to be in harmony with the theory that Congress must extend the laws of the United States to newly acquired territory. To this end the order contained the following:

*Congress also, by several enactments subsequent to the ratification of the treaty, have distinctly recognized California as a part of the Union, and have extended over it in several important particulars the laws of the United States. Under these circumstances, etc.*

The laws referred to were the act of August 12, 1848 (9 U. S. Stats., p. 301), and act of August 14, 1848 (9 U. S. Stats., p. 320).

The Thirtieth Congress did not accept the view expressed in the Walker circular, and at its second session passed "An act to extend the revenue laws of the United States over the territory and waters of Upper California, and to create a collection district therein," approved March 3, 1849 (9 U. S. Stats., chap. 112, p. 400).

Historically we know that the Polk administration did not act in California in accordance with the doctrine announced in the circular of October 7, 1848. If the Constitution and laws of the United States were in force in California, then it followed that the landing of foreign products in that territory, excepting at a port of entry, was prohibited by law. Since there were no ports of entry in the territory, no foreign products could be landed. Yet in October, 1848, California was the objective point of ships sailing on every sea, bringing passengers attracted to that territory by the discovery of gold therein, and these emigrants and their goods were not refused admission.

In none of his messages to Congress did President Polk advance the theory given form and substance by the Walker circular.

In his first annual message (December 2, 1845) President Polk, with reference to the annexation of Texas, said:

The Executive Government, the Congress, and the people of Texas in convention have successively complied with all the terms and conditions of the joint resolution.

\* \* \* \* \*

Questions deeply interesting to Texas, in common with the other States, the extension of our revenue laws and judicial system over her people and territory, as well as measures of a local character, will claim the early attention of Congress.  
\* \* \* (Messages and Papers of the Presidents, vol. 4, pp. 386, 387.)

In his second annual message (December 8, 1846) President Polk said:

It will be important during your present session to establish a Territorial government and to extend the jurisdiction and laws of the United States over the Territory of Oregon. \* \* \*

The establishment of custom-houses \* \* \* requires legislative authority. (Messages and Papers of the Presidents, vol. 4, p. 504.)

In his third annual message (December 7, 1847) President Polk, with reference to Oregon, said:

Our citizens who inhabit that distant region of country are still left without the protection of our laws or any regularly organized government. \* \* \* They should have the right of suffrage, be represented in a Territorial legislature and by a Delegate in Congress, and possess all the rights and privileges which citizens of other portions of the Territories of the United States have heretofore enjoyed or may now enjoy.

Our judicial system, revenue laws, laws regulating trade and intercourse with the Indian tribes, and the protection of our laws generally should be extended over them. (Messages and Papers of the Presidents, vol. 4, pp. 553, 559.)

In his message to Congress, dated July 6, 1848, notifying that body of the ratifications of the treaty of peace with Mexico on May 30, 1848, President Polk said:

The immediate establishment of Territorial governments and the *extension of our laws* over these valuable *possessions* are deemed to be not only important, but indis-

pensable to preserve order. \* \* \* Foreign commerce to a considerable amount is now carried on in the ports of Upper California, which will require to be regulated by our laws. *As soon as our system shall be extended over this commerce a revenue of considerable amount will be at once collected.* For these and other obvious reasons I deem it to be my duty earnestly to recommend the *action of Congress on the subject* at the present session. (Messages of the Presidents, vol. 4, pp. 588, 589.)

In his annual message to Congress dated December 5, 1848, President Polk said:

No revenue has been collected at the ports in California because Congress failed to authorize the establishment of custom-houses or the appointment of officers for that purpose. (Messages of the Presidents, vol. 4, p. 638.)

In the same message President Polk further said (*ib.*, p. 643):

It will be important to extend our revenue laws over these territories, and especially over California, at an early period. There is already considerable commerce with California, and until ports of entry shall be established and collectors appointed no revenue can be received.

Thereupon Congress passed "An act to extend the revenue laws of the United States over the territory and waters of Upper California, and to create a collection district therein," approved March 3, 1849. (9 U. S. Stats., chap. 112, p. 400.)

Mr. Polk retired from office March 4, 1849, leaving to his successor the adjustment of the complications which arose when Congress ascertained that the Executive had attempted to deal with California and New Mexico as being territory bound and benefited by the Constitution and laws of the United States.

The inhabitants of California and New Mexico, being advised by the Walker circular that "by the treaty with Mexico \* \* \* the Constitution of the United States is extended over that territory," naturally arrived at the conclusion that the provisions of the Constitution guaranteeing a republican form of government and securing representation in Congress were as potent as the requirements of the Constitution regarding uniform duties and imposts. If Congress were without discretion as to the one, how could it exercise discretion as to the others? Therefore the inhabitants, without waiting for Congress to authorize them so to do, proceeded to organize an independent State government, adopt a constitution, and elect Senators and Representatives in Congress. When the matter came before Congress, both the Senate and House of Representatives refused recognition to the credentials of the gentlemen claiming to be the Congressional delegations from said "States."

The numerous "enabling acts" whereby the creation of States has been authorized, and the various acts whereby the States so authorized to be created were thereafter admitted into the Union of States, show how universally and constantly it has been considered that the rights in relation to government of territory belonging to the United States are to be *conferred* or *granted* by Congress, and do not proceed from self-operating provisions of the Constitution.

President Taylor in his first annual message (December 4, 1849) said:

A collector has been appointed at San Francisco under the act of Congress extending the revenue laws over California, and measures have been taken to organize the custom-houses at that and the other ports mentioned in that act at the earliest period practicable. The collector proceeded overland and advices have not yet been received of his arrival at San Francisco. Meanwhile it is understood that the customs have continued to be collected there by officers acting under the military authority, as they were during the administration of my predecessor. It will, I think, be expedient to confirm the collections thus made and direct the avails (after such allowances as Congress may think fit to authorize) to be expended within the Territory, or to be paid into the Treasury for the purpose of meeting appropriations for the improvement of its rivers and harbors. (Messages and Papers of the Presidents, vol. 5, p. 19.)

#### ALASKA.

The treaty for the purchase of Alaska was proclaimed June 20, 1867. (15 Stat. L., 539.) On April 6, 1868, Mr. McCullough, then Secretary of the Treasury, addressed a letter to the collector of the port of New York wherein he acknowledged receipt of a request from the Russian minister for the free entry of certain oils shipped from Alaska to San Francisco and from there reshipped to New York. In response to this request Mr. McCullough said:

The request for the free entry of said oil was made on the ground that the oil was shipped from Sitka after the ratification of the treaty by which the territory of Alaska became the property of the United States. The treaty in question was ratified on the 20th of June, 1867, and the collector at San Francisco has reported that the manifest of the vessel shows the oil to have been shipped from Alaska on the 6th day of July, 1867, and that the shipment consisted of 52 packages. Under these circumstances you are hereby authorized to admit the said 52 packages of oil free of duty.

The views expressed by the Secretary of the Treasury were also entertained by the Secretary of State, William H. Seward. In a letter dated January 30, 1869, Mr. Seward said:

I understand the decision of the Supreme Court in the case of *Harrison v. Cross* (16 How., 164) to declare its opinion that, upon the addition to the United States of new territory by conquest and cession, the acts regulating foreign commerce attach to and take effect within such territory ipso facto and without any fresh act of legislation expressly giving such extension to the pre-existing laws. I can see no reason for a discrimination in this effect between acts regulating foreign commerce and the laws regulating intercourse with the Indian tribes.

On July 27, 1868, Congress passed an act entitled "An act to extend the laws of the United States relating to customs, commerce, and navigation over territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes." (15 Stat. L., 240.)

The first section of this act extended the laws of the United States relating to customs, commerce, and navigation to and over "all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia."

In connection with the course pursued by the administration of



President Johnson in the instance of Alaska, it is advisable to recall that President Johnson, prior to the time Alaska was acquired, had insisted that the Executive possessed the authority to determine what relations to the Federal Government of the United States should be sustained by the territory and inhabitants of the late rebellious States. If his position were well taken, it followed that, the treaty having been ratified by the Executive, there remained nothing to be done to complete the incorporation of Alaska into the United States.

**COMPARISON OF THE CONSTITUTIONAL REQUIREMENTS FOR UNIFORM TARIFF LAWS WITH THE REQUIREMENTS AS TO UNIFORM LAWS ON INTERNAL-REVENUE AND DIRECT TAXES.**

Under the Constitution, the internal-revenue laws should be as universal and uniform in application as the tariff laws.

The first internal-revenue tax on spirits distilled in the United States was levied by the act of March 3, 1791, which, for purposes of collection, provided "that the United States shall be divided into fourteen districts, each consisting of one State." (1 U. S. Stats., sec. 4, pp. 199, 200.)

Although said act did not prohibit the distilling of spirits except in compliance with said tax regulations, no provision was made for the collection of said tax in the territories not included in the boundaries of the existing fourteen States.

It was not until 1868 that the internal-revenue laws were extended to apply to all places "within the exterior boundaries of the United States." (15 U. S. Stats., sec. 107, p. 167.)

The territories thus subjected to the provisions of the internal-revenue acts were the Indian reservations and the lands of the civilized tribes, which theretofore had not been invaded by the collector of internal-revenue taxes.

The provisions of the Constitution for direct taxation, instead of requiring that direct taxes shall be universal and uniform, requires that they shall be "apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined" by enumeration. (Art. 1, sec. 2, clause 3.)

This provision is apparently coextensive with that relating to customs. The two clauses must be taken together, and the fact that one in requiring uniformity mentions the United States as a whole, and the other in prescribing a rule of proportion among the several parts refers to the taxable area distributively, can not be taken to mean that the limits of the taxable area in the two cases are different. In the first twenty-five years of the Government's existence, under the Constitution, Congress provided for several levies of direct taxes, which were imposed solely on the States. Finally, one was extended to territory (District of Columbia), and in upholding it Chief Justice

Marshall held that while Congress *might* include the Territories in imposing a direct tax, Congress were not required to do so. (*Loughborough v. Blake*, 5 Wheat., 317.)

If, as Chief Justice Marshall held, the Constitution allows Congress discretion in fixing the area to be affected by direct taxation, by confining the direct tax to States or extending it to include the Territories, does not the Constitution permit a like discretion in fixing the area affected by indirect taxation?

Attention is also directed to certain legislation of Congress relating to the United States Bank and Louisiana. The original charter of the bank authorized the directors to establish branch banks "wheresoever they shall see fit within the United States." (Act Feb. 25, 1791: 1 U. S. Stats., sec. 15, p. 195.)

Upon the acquisition of Louisiana the bank desired to establish a branch in New Orleans. To enable it to do so Congress passed the following act:

AN ACT supplementary to the act intituled "An act to incorporate the subscribers to the Bank of the United States."

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the president and directors of the Bank of the United States shall be, and they are hereby, authorized to establish offices of discount and deposit in any part of the Territories or *dependencies* of the United States, in the manner and on the terms prescribed by the act to which this is a supplement.

Approved March 23, 1804. (2 U. S. Stats., p. 274.)

The Constitution requires that—

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. (Art. 4, sec. 1.)

The First Congress (1790) passed an act providing—

That the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court *within the United States* by the attestation \* \* \* And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court *within the United States* as \* \* \* (Act of May 26, 1790, 1 U. S. Stats., p. 122.)

When the province of Louisiana was acquired, it was of course necessary to secure a like recognition in that territory for such public acts, records, and judicial proceedings.

To accomplish this the Eighth Congress (1804) passed "An act *supplementary* to the act entitled," etc., being the act above referred to. This act specifically divided all territory under the sovereignty of the United States into three classes, as follows:

- (1) States of the Union.
- (2) Territories of the United States.
- (3) Countries subject to the jurisdiction of the United States.

This classification appears in section 2 of said act, which is as follows:

That all the provisions of this act and the act to which this is a supplement shall apply as well to the public acts, records, office books, judicial proceedings, courts,

and offices of the respective *Territories* of the United States and *countries subject to the jurisdiction* of the United States as to the public acts, records, office books, judicial proceedings, courts, and offices of the several *States*. (Act of March 27, 1804, 2 U. S. Stats., pp. 298, 299.)

This classification, adopted by the Eighth Congress and approved by President Jefferson, is preserved to this day. Sections 905 and 906, Revised Statutes of the United States (1878), are as follows:

905. The acts of the legislature of any State or Territory *or any country subject to the jurisdiction of the United States*, etc.

906. All records and exemplifications of books which may be kept in any public office of any State or Territory *or any country subject to the jurisdiction of the United States*, etc.

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**REPORT ON THE RIGHT OF SPAIN TO ACCEPT A RENEWAL OF ALLEGIANCE TO IT BY INDIVIDUAL INHABITANTS OF THE TERRITORIES ACQUIRED BY THE UNITED STATES AS A RESULT OF THE SPANISH-AMERICAN WAR, AND TO REINSTATE SUCH INDIVIDUALS IN SPANISH CITIZENSHIP.**

[Submitted June 24, 1901. Case No. 425, Division of Insular Affairs, War Department.]

**SYNOPSIS.**

1. The provisions of the royal decree of Spain (May 11, 1901) do not infringe upon the rights of the United States respecting the allegiance of the inhabitants of the islands affected by the treaty of Paris, 1898.
2. The provisions of said royal decree do not violate the provisions of said treaty.

SIR: I have the honor to acknowledge and comply with your request for a report on the above-entitled subject, presented as follows:

The State Department transmits to the Secretary of War a copy of a royal decree of Spain, dated May 11, 1901, declaring the law of Spain on the subject of the change of citizenship of the inhabitants of the territories ceded or relinquished by the treaty of Paris, December 10, 1898, and the procedure by which persons who have lost their Spanish citizenship may recover it.

In the letter transmitting said decree the Acting Secretary of State, Hon. David J. Hill, says—

Some of the articles of this decree do not appear to be in harmony with the stipulations of the treaty, but the apparent conflict is probably intended to be saved by the provisions of Article V.

(NOTE.—In the copy of decree transmitted by the State Department the article immediately succeeding article 4 is not numbered, and the one succeeding that is numbered 7.)

The examination and report desired by the Secretary of War is understood by the writer to be in respect of the following questions:

1. Do the provisions of said royal decree of Spain (May 11, 1901) infringe upon the rights of the United States in the matters with which said decree deals?
2. Do the provisions of said royal decree violate provisions of the treaty of Paris (1898)?

I am of opinion that both questions are to be answered in the negative.

The provisions of said decree relate exclusively to citizenship under the Government of Spain. They declare the willingness of that Government to confer citizenship on certain classes of individuals, provided such individuals follow a certain procedure whereby would be evidenced the desire of such individuals to accept such citizenship. No attempt is made to force Spanish citizenship upon any person unwilling to assume it.

Apparently the decree goes no further than to declare that the provisions of articles 19, 21, and 23 of the civil code of Spain are applicable to the cases of former citizens of Spain whose citizenship and appurtenant rights were affected by the treaty of Paris.

Said articles are as follows (Laws of Cuba, Porto Rico, and the Philippines, vol. 1, War Dept. Trans.):

ART. 19. The children of a foreigner born in Spanish possessions must state, within the year following their majority or emancipation, whether they desire to enjoy the citizenship of Spaniards granted them by article 17.

\* \* \* \* \*

ART. 21. A Spaniard who loses his citizenship by acquiring the nationality of a foreign country can recover it upon returning to the Kingdom by declaring to the official in charge of the civil registry of the domicile which he elects that such is his wish, in order that the proper entry may be made, and by renouncing the protection of the flag of said country.

\* \* \* \* \*

ART. 23. Any Spaniard who loses his citizenship by accepting employment from any other government, or by entering the armed service of a foreign power without the King's permission, can not recover the Spanish nationality without previously obtaining the royal authorization.

The civil code of Spain, including these articles, has been in force in the Spanish Peninsula since May, 1888, and was extended to Cuba, Porto Rico, and the Philippines by decree dated July 31, 1889. The existence and enforcement of said provision of said law of Spain have been acquiesced in by the United States, without challenge, during the period indicated, and at the present time is not objected to when applied to individual residents or citizens of the States of the Union who for any reason desire to be reinstated in Spanish citizenship.

This decree does not ordain new laws nor provide new tests or procedure. It simply declares the willingness of Spain to treat its former subjects in the territories ceded or relinquished in the treaty of Paris in the same way it does its former subjects in other portions of the globe.

In adopting said provisions of said civil code Spain asserts a right which the United States has always contended belonged to each member of the family of nations. From its inception this Government has insisted that the right of a man to confer his permanent allegiance upon a sovereign was a natural right in the exercise of which the man was a free agent. This right of expatriation was the subject of an

elaborate opinion by Attorney-General Cushing in 1856. Therein he said:

The doctrine of absolute and perpetual allegiance, the root of the denial of any right of emigration, is inadmissible in the United States. It was a matter involved in and settled for us by the Revolution, which founded the American Union. (8 Op. Atty. Gen., p. 139. See also 9 Op. Atty. Gen., p. 356; Atty. Gen. Black.)

The right of expatriation was declared by Congress to be a natural and inherent one, in this country, by act of July 27, 1868. (15 Stat. L., p. 223, chap. 249; secs. 1999, 2000, U. S. Rev. Stats.)

The existence of the right of expatriation establishes the correlative right of the sovereign to accept the proffer of allegiance.

The United States is equally committed to the doctrine that an independent state may tender citizenship to any or all persons upon such terms and conditions as it sees fit to adopt, and, in so doing, is not accountable to any other state.

The United States in negotiating and entering into the treaty of Paris did not attempt to limit or prohibit the exercise of said rights by the inhabitants of the territories ceded or relinquished. The treaty provides as follows (Art. IX):

Spanish subjects, natives of the Peninsula residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

Ordinarily, treaties ceding territory contain stipulations intended to protect the civil and political rights of the inhabitants or to afford guaranty of present or prospective citizenship under the new government. But in entering into the treaty of Paris (1898) Spain did not insist upon such guaranties, and willingly committed the inhabitants of the territories ceded and relinquished to the justice and generosity of the sovereign people of the United States. Hence the provision:

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

The United States recognized the right of said inhabitants to continue in allegiance to the Crown of Spain or to confer their permanent allegiance upon the United States. It therefore became necessary to adopt a test or rule of evidence whereby might be ascertained which

course the individual inhabitants had elected to pursue. Hence the provisions of Article IX of the treaty:

In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

This provision of the treaty simply declares the ordinary rule that allegiance is presumed from the fact of residence in the country and participation in the protection and other benefits of organized government. In regard to this rule Halleck says:

The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become, or not to become, its subjects. Their obligations to the former government are canceled, and they may or may not become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new state, and is not unjust toward those who determine not to become its subjects. According to this rule, *domicile*, as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided. (Halleck's Int. Law, vol. 2, sec. 7, p. 475, 3d ed.)

"Allegiance," as heretofore used in this report, means the *absolute* and *permanent* obligation such as the citizen owes to his government until relieved therefrom by his own act or that of the government. But an alien, domiciled in any country, owes a temporary allegiance to the government of that country, continuing during such residence. (*Carlisle v. United States*, 16 Wall., 147, 154.)

Local or actual allegiance is that which is due from an alien while resident in a country in return for the protection afforded by the government. (Kent's Com., vol. 2, p. 42.)

The inhabitants of the territories ceded or relinquished by Spain in the treaty of Paris, so long as they remain in said territories, are required to yield such temporary allegiance without regard to their citizenship.

The foregoing report being submitted to the Acting Secretary of War was by him transmitted to the State Department with the following communication:

JUNE 24, 1901.

SIR: I have the honor to acknowledge receipt of communication from the Hon. David J. Hill, Acting Secretary of State, dated June 12, 1901, inclosing copy of a dispatch from the United States minister to Spain, forwarding a copy of the royal decree concerning change of citizenship under the treaty of Paris (1898).

In said letter the Acting Secretary of State says: "Some of the articles of this decree do not appear to be in harmony with the stipulations of the treaty, but the apparent conflict is probably intended to be saved by the provisions of Article V."

The doubt suggested by the foregoing caused the matter to be referred to the law officer of the Division of Insular Affairs, War Department, for examination and report. A copy of that officer's report is herewith transmitted. I am inclined to agree with the view taken therein. I should be pleased to have an expression of your views on the matter, as it will be necessary to advise the military governments what course they are to pursue with reference to the matters dealt with in said decree.

Very respectfully,

WM. CAREY SANGER,  
*Acting Secretary of War.*

THE SECRETARY OF STATE.

The State Department concurred in the views expressed in the report, and thereupon the War Department advised the government of the Philippines and the government of Cuba as follows:

JULY 16, 1901.

SIR: I have the honor to transmit copy of the royal decree of Spain, dated May 11, 1901, which said decree declares the terms and conditions under which Spain is willing to accept a renewal of allegiance to it by certain individual inhabitants of the territories acquired by the United States as a result of the Spanish-American war, and to reinstate such individuals in Spanish citizenship.

Upon examination this Department was of opinion that said decree did not infringe upon the rights of the United States in the matters dealt with, nor violate the provisions of the treaty of peace. This view was communicated to the State Department with request for the opinion of that Department, and in response thereto the Acting Secretary of State says:

"The Department thinks there is nothing in the Spanish decree to which this Government can properly object." (State Department's letter of July 3, 1901.)

I transmit copy of correspondence with State Department and the report of the law officer, Division of Insular Affairs, War Department.

Very respectfully,

WM. CAREY SANGER,  
*Acting Secretary of War.*

HON. WILLIAM H. TAFT,  
*Civil Governor of the Philippine Islands.*

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**IN RE CLAIM OF THE MANILA RAILWAY COMPANY, LIMITED,  
FOR PAYMENT BY THE UNITED STATES OF INTEREST ON THE  
CAPITAL INVESTED IN THE RAILWAY OWNED AND OPERATED  
BY SAID COMPANY, PURSUANT TO GUARANTY OF SAID INTER-  
EST BY THE SPANISH GOVERNMENT.<sup>a</sup>**

[Submitted December 21, 1899. Case No. 849, Division of Insular Affairs, War Department.]

[Printed as War Department publication by order of the Secretary of War.]

**SYNOPSIS.**

1. The funds of the United States subject to the orders of the War Department are not available for the payment of claims based upon obligations of the Government of Spain, even though it were conceded that the United States had assumed said obligations or otherwise become liable thereon.

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<sup>a</sup> See opinion of Attorney-General Griggs, July 26, 1900.

2. The executive branch of this Government refuses to consider the funds arising from the revenues derived from the islands, the sovereignty of which was ceded and relinquished by Spain in the late treaty of peace, as being the funds or property of the United States. Said revenues are collected by exercise of belligerent right for the purpose of defraying the expenses of maintaining peace and order in said islands by and through the provisional government instituted therein pursuant to the requirements of the laws of war.
3. During the negotiations which resulted in the treaty of Paris (December 10, 1898) the Spanish Commission proposed that the Government of the United States should "be holden to all the rights and obligations of the Spanish Government" created by the "railroad concession from Manila to Dagupan." Said proposal was rejected by the American Commission, with the declaration "that they would not accept any articles that required the United States to assume the so-called colonial debts of Spain;" but, in respect to the Philippines, the American Commission agreed that their Government should pay to Spain the sum of \$20,000,000. Proceedings of the Commissions reviewed and opinion arrived at that said payment was in lieu of an assumption by the United States of the financial obligations of the Government of Spain created for the benefit of the Philippines.
4. The position taken by the American Commission was approved by the President and made known to Congress. That body approved said position by ratifying the treaty based upon said position. It is, therefore, to be supported by the coordinate branches of the Government. It can not be adjudged untenable either by this Department or the provisional government temporarily in charge of the civil affairs of the islands.
5. The contract obligations of Spain created by the guaranty of interest on the capital invested in the enterprise included in the concession now owned by the Manila Railway Company did not pass to and become binding upon the United States by operation of international law upon the cession of sovereignty by Spain and the acceptance of sovereignty over said islands by the United States.
6. Liability for debt arising upon the personal obligation of the General Government, unsecured by the mortgage of the territory ceded, does not pass with the sovereignty of territory unless stipulated for in the treaty of cession. Such liability is part of the national debt of the nation making the cession. The taking over of the whole or any part thereof is an act of grace by the succeeding sovereign. Its accomplishment requires an affirmative act on the part of such sovereign. The sole dependence of a claimant desiring such grace is that the equities of his cause will appeal to the conscience of the new sovereign. Under the distribution of powers made by our Constitution such acts of grace by the sovereignty of the United States must be performed by Congress.
7. The guaranty of the Spanish Government evidenced by the provisions of the concession to the Manila Railway Company is not a lien upon the island of Luzon.
8. The revenues now being collected by the provisional government of the Philippine Islands are not burdened with a trust in favor of the Manila Railway Company to secure the performance of the contract obligations of the Government of Spain.

SIR: In response to your request I have the honor to submit the following report *in re* claim of the Manila Railway Company, Limited, for payment by the United States of interest on the capital invested in the railway owned and operated by said company, pursuant to guarantee of said interest by the Spanish Government.

The facts out of which the claim arises are as follows: The Manila



Railway Company, Limited, a corporation organized under the laws of Great Britain, obtained a concession from the Spanish Government for a railroad from Manila to Dagupan, in the island of Luzon, a distance of about one hundred and thirty miles. By the terms of the concession the Spanish Government guaranteed a return of eight per centum per annum upon the capital invested in the railroad. The claimant represents that the amount originally so invested was \$4,964,400, but that the amount was subsequently increased, with the concurrence of the Spanish authorities, to \$5,353,700.89. The Spanish Government, up to the time of the Spanish-American war, fulfilled its obligations under this contract by paying quarterly installments of the subvention as they accrued, the amount varying with the earnings of the railway.

The Manila Railway Company now shows that by the late treaty of peace between the United States and Spain the sovereignty of the island of Luzon and the other islands of the Philippine Archipelago was ceded by Spain to the United States, and that said sovereignty was assumed by the United States. (30 Stats. at Large, 1754.)

The company contends that by said cession and assumption the United States became bound to respond to the obligations of the Spanish Government under said concession. The company therefore claims that the United States should pay to it the amounts due on the subvention which have accrued since the date of the treaty of peace. These amounts are as follows:

For quarter ending March 31, 1899 .....	\$30, 293. 00
For quarter ending June 30, 1899.....	99, 781. 97
For quarter ending September 30, 1899 .....	106, 994. 00
Total.....	237, 068. 97

The claim is made against the United States Government and presented to the War Department for payment. As thus presented the matter may be summarily disposed of by announcing the incontestable fact that there are no funds subject to the orders of the War Department which are available for the payment of claims of this character against the United States. If it were admitted that the claim is just and right and the United States bound to pay it, if payment is sought out of funds belonging to the United States Government, such funds must be provided and made available by Congress. None of the funds of the United States available to this Department can be devoted to such purpose.

Probably the railway company seeks to have this Department order said claim paid out of the moneys accruing from the revenues of the Philippine Islands, collected by the provisional government now being maintained there by the United States pursuant to the military occupation of said archipelago. The United States Govern-

ment refuses to consider the money derived from said revenues as funds of the National Government of the United States, and declines to receive it into its Treasury or allow the Treasury Department to assume liability or responsibility in regard thereto. It follows that a claim asserted against the United States as an obligation of the United States can not be paid out of said moneys. If the United States is under obligation to pay the amounts due on this subvention, payment should be made out of national funds of the United States. In order to make such payment out of said funds, it is necessary that Congress should provide for the payment by an appropriation therefor.

The importance of the questions involved and the relation which this Department sustains to the territories lately ceded and relinquished by Spain to the United States hardly permit of disposing of the matter in such indeterminate manner, and therefore the discussion is extended to the bases on which the contention of the claimant rests.

The guaranty under which this claim is made appears in the concession, as follows:

4. The Government will aid the construction of the line by guaranteeing the interest of 8 per cent per annum upon the capital which might be invested. (Doc. 10, 849.)

The concession was finally conferred upon the party from whom the Manila Railway Company derived it, by royal decree, from which the following is quoted:

His Majesty The King (to whom God grant long life), and in his name, the Queen Regent of the Kingdom, has deigned to approve \* \* \* the concession for the railway from Manila to Dagupan of those islands, with the subsidy of 8 per centum annually, etc. (Doc. 11, 849.)

It will be seen that this is an obligation of the National Government of Spain and not of a provincial or municipal government. An autonomous government, other than the Crown of Spain, capable of granting this concession did not exist in the island of Luzon at the time the obligation was created. The undertaking was that of the *sovereignty* of Spain, not of a *dependency*.

*Did the United States assume this liability of the Spanish Government?*

It certainly did not assume such liability by the terms of the treaty of Paris. That instrument does not provide for nor suggest such substitution. It is silent upon that point. But while the treaty is silent in regard to said matter the proceedings of the commissions which formulated said treaty are not silent. By reference to the message from the President of the United States to the Fifty-fifth Congress, transmitting the treaty of peace with Spain (Sen. Doc., No. 62, part 1), it will be seen that the Spanish Commission tried to induce the American Commission to consent to the insertion in said treaty of words which would bind the United States for the payment of all,

or at least a portion, of the liabilities incurred by Spain for or on account of the Philippines, Cuba, and Porto Rico. Many notes relating to this subject and numerous proposals in regard thereto were submitted by the Spanish Commission and rejected by the American Commission. (*See id.*, pp. 41, 48, 59, 85, 100, 103, 240, 262.)

By reference to pages 240, 241 of said publication, it appears that by protocol 20 the Spanish Commission proposed that the United States should "be holden to all the rights and obligations of the Spanish Government" by reason of the "railroad concession from Manila to Dagupan," and that said proposal was rejected by the American Commission.

The final outcome of the negotiation and the basis of the treaty stipulation is shown by the following notes passing between said commissions on November 22, 1898. (*Id.*, pp. 216-218):

*Annex 1 to Protocol No. 16.*

COMMISSION FOR THE NEGOTIATION OF  
PEACE WITH THE UNITED STATES,  
*Paris, November 22, 1898.*

MR. WILLIAM R. DAY.

MY DEAR SIR: In order that this commission and, if necessary, the Government of H. C. M. may study with a full and exact knowledge the proposition which closes the memorandum presented at yesterday's session by the Commission you worthily head, the translation into Spanish of which has just been completed, it becomes necessary to beg you that with all possible haste you will be pleased to make clear the meaning of the following points of said proposition, which to me is obscure and vague:

First. Is the proposition you make based on the Spanish colonies being transferred free of all burdens, all, absolutely all, outstanding obligations and debts, of whatsoever kind and whatever may have been their origin and purpose, remaining thereby chargeable exclusively to Spain? \* \* \*

E. MONTERO RIOS.

*Annex 2 to Protocol No. 16.*

UNITED STATES AND SPANISH PEACE COMMISSION,  
UNITED STATES COMMISSIONERS,  
*Paris, November 22, 1898.*

SEÑOR DON E. MONTERO RIOS.

MY DEAR SIR: Having received and read your letter of to-day, touching the final proposition presented by the American Commissioners at yesterday's conference, I hasten to answer your inquiries *seriatim*, first stating your question and then giving my reply.

First. Is the proposition you make based on the Spanish colonies being transferred free of all burdens, all, absolutely all, outstanding obligations and debts, of whatsoever kind and whatever may have been their origin and purpose, remaining thereby chargeable exclusively to Spain?

In reply to this question it is proper to call attention to the fact that the American Commissioners, in their paper of yesterday, expressed the hope that they might receive within a certain time "a definite and final acceptance" of their proposal as to the Philippines, and also "of the demands as to Cuba, Porto Rico, and other Spanish islands in the West Indies, and Guam, in the form in which those demands have been provisionally agreed to."

The form in which they have thus been agreed to is found in the proposal presented by the American Commissioners on the 17th of October and annexed to the protocol of the sixth conference, and is as follows:

ARTICLE 1. Spain hereby relinquishes all claim of sovereignty over and title to Cuba.

ART. 2. Spain hereby cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the island of Guam in the Ladrões.

These articles contain no provision for the assumption of debt by the United States.

In this relation I desire to recall the statements in which the American commissioners have in our conferences repeatedly declared that they would not accept any articles that required the United States to assume the so-called colonial debts of Spain.

To these statements I have nothing to add.

But in respect of the Philippines the American commissioners, while including the cession of the archipelago in the article in which Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the island of Guam in the Ladrões," or in an article expressed in similar words, will agree that their Government shall pay to Spain the sum of \$20,000,000.

\* \* \* \* \*

WILLIAM R. DAY.

The United States both generally and specifically refused to assume the obligations of this concession. A review of the many notes on this subject which passed between the Spanish and American commissioners convinces me that the amount of \$20,000,000 was paid by the United States and accepted by Spain in lieu of a transfer of said obligation. This application of the Manila Railway Company finds no support or assistance in the treaty of peace with Spain.

*Does international law require that the United States assume the contract obligations of Spain created by the guaranty provided in the concession to the Manila Railway Company?*

To answer this interrogatory it is necessary to determine whether or not the debt arises on the personal obligation of the national Government of Spain or that of the local government of the ceded territory.

Liability for debt arising upon the personal obligation of the general government does not pass with ceded territory unless stipulated for in the treaty of cession. Ordinarily a treaty of cession resulting from conquest does not contain such stipulation.

Hall on International Law says (4th ed., p. 104, note):

There are one or two instances in which a conquering state has taken over a part of the general debt of the state from which it has seized the territory. Thus in 1866 the debt of Denmark was divided between that country and Slesvig-Holstein, and in the same year Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated. It may be doubted whether any other like cases have occurred.

The reason for this rule is apparent. Conquest is one way by which a nation enforces payment of a debt. But if the enforcement of the payment subjected the creditor nation to a proportionate share of

the debts of the debtor nation, the purpose of the proceeding would be defeated. If such were the rule, an enormous national debt would afford a better protection than an army and navy, and the more hopelessly bankrupt a nation was, the less the likelihood of its being called upon to perform its international obligations. Such a rule would eventually disrupt the family of nations.

Hall on International Law further says (note, p. 99):

The fact remains that the general debt of a state is a personal obligation. The case also of the creation of a new state out of part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one state to another. When the latter occurs, at least as the result of conquest, it is not usual to take over any part of the general debt of the state ceding territory.

The Spanish Commission at Paris, 1898, insisted that it was usual and customary to assume a proportionate share of such obligations upon the cession of territory, and proposed the following as a treaty stipulation (55th Cong., 3d sess., Sen. Doc. 62, p. 240):

Contracts formally entered into by the Spanish Government or its authorities for the public service of the islands of Cuba and Porto Rico, the Philippines, and others ceded by this treaty, and which contracts are still unperformed, shall continue in force until their expiration pursuant to the terms thereof. Such contracts as also cover the service peculiar to Spain or any of her other colonies, the new government of the above-mentioned islands shall not be called upon to carry out, save only in so far as the terms of said contracts relate to the particular service or treasury of such islands. The new government will therefore, as regards the said contracts, be holden to all the rights and obligations therein attaching to the Spanish Government.

*	*	*	*	*	*	*
Railroad concession from Manila to Daguapan.						
*	*	*	*	*	*	*

The American Commission rejected this proposal (Id., p. 241), and the Spanish Commission filed a protest, and in support thereof said with reference to the action of the United States (Id., p. 258):

It refuses also to stipulate anything in relation to the respect due the contracts entered into by a legitimate sovereign for public works and services—contracts which materially affect the rights of property of private individuals, which were respected in the treaties of Campo Formio of 1797, of Paris of 1814, of Zurich of 1859, of Paris of 1860, of Vienna of 1864 and 1866, and which Germany respected also when ending the war with France by the treaty of Frankfort of 1871.

The fact that the treaties referred to contained such stipulations shows that obligations of the character designated do not pass with the territory, for if they did, a special stipulation would not be necessary.

An application of this doctrine may be found in the diplomatic correspondence between the United States and England in 1854, with reference to the authority exercised by England over the Mosquito shore. In illustration of the arguments of the United States, reference was made by Mr. Buchanan to a treaty between Great Britain and Mexico, and it was urged generally that "it would be a work of supererogation to attempt to prove at this period of the world's his-

tory that these provinces having, by a successful revolution, become independent states, succeeded within their respective limits to all the territorial rights of Spain." Lord Clarendon replied that the clause in the treaty with Mexico stipulating that British subjects shall not be disturbed in the "enjoyment and exercise of the rights, privileges, and immunities" previously enjoyed under a treaty with Spain, which had been referred to by Mr. Buchanan as proving the adhesion of Great Britain to the doctrine stated by him, proves, on the contrary, that "Mexico was not considered as inheriting the *obligations* or rights of Spain, as otherwise a special stipulation would not be necessary." (De Martens. Nouv. Rec. Gen. II, 201-206.)

In commenting on this correspondence, Hall on International Law says (4th ed., pp. 101-102):

The contention of Lord Clarendon was evidently well founded. Mr. Buchanan's general statement was accurate, but the very fact that Mexico succeeded to all the territorial rights of Spain, and consequently to full sovereignty within the territory of the Republic, shows that it could not be burdened by limitations on sovereignty to which Spain had chosen to consent. It possessed all the rights appertaining to an independent state, disencumbered from personal contracts entered into by the state from which it had severed itself.

That the obligation which the Manila Railway Company is now seeking to have the United States assume is "a general debt" and "personal contract" of the Spanish Government is clearly shown by the learned discussion of the matter in the note of the American Commission prepared by Hon. John B. Moore, counsel to the commissioners of the United States, and submitted October 14, 1898. (See said Sen. Doc. No. 62, pp. 48-50.)

The position taken by the American Commissioners, ably sustained by their counsel, ratified by Congress and approved by the Executive, is to be supported by the coordinate branches of the Government. (Foster et al. v. Neilson, 2 Pet., 307; Garcia v. Lee, 12 Pet., 516; United States v. Reynes, 9 How., 153; Doe v. Braden, 16 How., 635.)

Certainly the position can not be overthrown by the provisional government existing in the Philippines.

The Manila Railway Company concedes that the obligation which it is now seeking to enforce against the United States was originally an obligation of the National Government of Spain. The company contends that the obligation was upon the sovereignty of Spain, attached thereto, and passed therewith. From its application herein the following is quoted (*see* Letter dated November 27, 1899, signed F. W. Whitridge, Doc. 7, 849):

The Spanish Government down to the time of the Spanish-American war fulfilled its obligations under this contract by paying from time to time the quarterly installments of the subvention as they accrued, the amount of which varied from time to time with the earnings of the railway company. Record of the fact of such payment by the Spanish authorities can undoubtedly be found in the Government offices at Manila. I am also informed, although not by the Manila Railway Com-

pany, that the fact of this contract and of the obligations of the Spanish Government arising thereunder was laid before the Peace Commissioners at Paris, and the obligations of the Spanish Government in respect to the railway, maturing and as yet undischarged, were considered by the American Commissioners in estimating the amount of money to be paid to the Spanish Crown on the ratification of the treaty of peace. If this information be correct, I think that it would tend to show that this Government had already expressly recognized the contract in question.

Whether the contract has or not been recognized, I respectfully represent to you that with the cession of the Philippine Islands under the treaty of peace between the United States and Spain the sovereignty of Spain in those islands was ceded by Spain to and was assumed by the United States, and with that cession of the sovereignty there passed to and there was assumed by the United States the obligations of the Spanish Government under this contract. The Manila Railway Company therefore claims that the United States should pay the amount of the quarterly installments due on the subvention which have accrued since the date of the treaty of peace.

It is gratifying to note that the Spanish Government recognizes the obligations, of the character of the one under consideration, as belonging to the National Government of Spain and still binding upon it. In July, 1899, the Spanish minister of finance submitted to the Cortes a proposed law for the reorganization of the debts of Spain. In presenting said law Señor Villaverde, Spanish minister of finance, stated that the Spanish Government declares that it does not consider that the question of the debts of the colonies ceded and relinquished by Spain were finally settled by the negotiations at Paris, nor by the ominous silence of the treaty of peace on the matter. He insisted that the Spanish Government still has the right to insist that where the revenues of a colony were mortgaged or pledged for the payment of a debt the revenues of the territory constituting said colony should be applied to the payment of said debts, although said territory had been ceded to another sovereignty, which refused to take over said obligations and was collecting revenues by virtue of its own right to levy and collect them. The finance minister's official statement was published in the Madrid Gazette and republished by the press of this country. From what purports to be an extract from the official publication in the Madrid Gazette I quote the following:

Nevertheless, the statesman who presided over the Spanish commission has declared in a noteworthy document, written on the day after the treaty was signed, that though it is true that the American Commissioners did not admit the validity of the mortgage on the Cuban revenues, and did not consent that they should pass to the colonies as a responsibility inherent in the sovereignty, the Spanish commissioners on their side did not assent to the contrary contention, and the question remained intact (in Spanish, *integra*). Thus it must be respected, with the hope that by new agreements of the same sort as those for the recognition of the independence of other Hispano-American nations there will be recognized in the future the undoubted right to claim that the revenues of the island of Cuba should answer as a mortgage for the interest and amortization of those debts which the Spanish nation created legitimately in the exercise of its sovereignty. Nevertheless, the Government does not believe that, reserving the exercise of this right, there is any ground in the meanwhile for repudiating the Cuban debts. The Cuban debts, like those of the Philip-

pires, had the general guaranty of the Spanish nation, and the nation can not do otherwise than honor its signature. These debts must consequently figure in the budget, and they are in the budget which I have the honor of presenting. (*See Washington Times, August 9, 1899.*)

This proceeding of the Spanish Government directs attention to the fact that the Government with which the Manila Railway Company contracted and from which it secured a guaranty is still in existence and recognizes the contract as binding upon it. Evidently the Spanish Government does not think its obligation "passed" with a cession of its sovereignty over a small portion of its territorial domain.

The concession provides as follows:

10. The subvention with which the Treasury will aid the concessionaire shall be paid at the end of every quarter. \* \* \* The sum which the treasury of the Philippine Islands is to pay quarterly as subvention shall be fixed by deducting from the sum. \* \* \*

The purpose of this provision appears to be to fix the place where the payments should be made.

In 1894 the company applied to the Government of Spain for payment of the subvention at Madrid in money current and in circulation in Spain, or, if paid in Manila, that the company be compensated for the depreciation which money circulating only in the Philippines suffered in the other Spanish possessions. The demand of the company was denied by the general administration of the State and the matter was appealed to the tribunal in contentious administrative matters sitting in Madrid, which sustained the action of the Government.

The full proceedings of the court are not accessible to this Department. A copy of the decree is filed herein by the applicant. In said decree the court several times refers to the contract of subvention, and in each instance designates it as a contract with the "State" or the "General administration of the State." Thus, "the subvention granted by the State to the railway." (Doc. 40, p. 1.) "The contract entered into between the administration and the concessionaire company." (Id., p. 4.) "The subvention granted by the State." (Id., p. 4.) "There is no reason whatever compelling the State to pay the subvention in any other manner." (Id., p. 4.) "We do hereby absolve the general administration of the State from the claim interposed." (Id., p. 5.)

From this decree it does not appear that the court or the contestants considered the contract as being that of a local government in the Philippines or of a political subdivision. If such had been the interpretation or understanding of the company at that time, it is difficult to see upon what ground it rested the claim that the subvention should be paid in Madrid and in a different currency than was in circulation in the Philippines. The gist of the decision of the court is that the State received the money circulating in the Philippines in payment of taxes and other obligations to the State, and therefore the liabilities of the State were to be discharged with the same money. (Doc. 40.)



Honorable Whitelaw Reid, a member of the American Commission which negotiated the late treaty of peace with Spain, discusses the question now under consideration in an article entitled, "Some consequences of the late treaty of Paris; advances in international law and changes in national policy," published in *The Anglo-Saxon Review*, June, 1899. One topic therein treated by this eminent publicist is, "When debt does not follow sovereignty." Speaking of what are known as the "Cuban bonds" issued by the Spanish Government to about \$300,000,000, to the payment of which Spain pledged the revenues received by her from the island of Cuba and her own guarantee, Mr. Reid says:

But the fact was that these were the bonds of the Spanish nation, issued by the Spanish nation for its own purposes, guaranteed in terms "by the faith of the Spanish nation," and with another guarantee pledging Spanish sovereignty and control over certain colonial revenues. Spain failed to maintain her title to the security she had pledged, but the lenders knew the instability of that security when they risked their money on it. \* \* \* The Spanish contention that it was in their power as absolute sovereign of the struggling island to fasten ineradicably upon it for their own hostile purposes unlimited claims to its future revenues would lead to extraordinary results. Under that doctrine any hard-pushed oppressor would have a certain means of subduing the most righteous revolt and condemning a colony to perpetual subjugation. He would only have to load it with bonds, issued for his own purposes, beyond any possible capacity it could ever have for payment. Under that load it could neither sustain itself independently, even if successful in war, nor persuade any other power to accept responsibility for and control over it. It would be rendered impotent either for freedom or for any change of sovereignty. To ask the nation sprung from the successful revolt of the thirteen colonies to acknowledge and act on an immoral doctrine like that was indeed ingenuous—or audacious. The American Commissioners pronounced it alike repugnant to common sense and menacing to liberty and civilization. The Spanish commissioners resented the characterization, but it is believed that the considerate judgment of the world will yet approve it.

In regard to what is known as the "Philippine debt" Mr. Reid says:

Warned by the results of inquiry as to the origin of the Cuban debt, the American Commissioners avoided undertaking to assume this *en bloc*. But in their first statement of the claim for cession of sovereignty in the Philippines they were careful to say that they were ready to stipulate "for the assumption of any existing indebtedness of Spain incurred for public works and improvements of a pacific character in the Philippines." Not till they learned that of this entire "Philippine debt" (only issued in 1897) over one-fourth had actually been transferred to Cuba to carry on the war against the Cuban insurgents, and finally against the United States, and that the most of the balance had probably been used in prosecuting the war in Luzon, did the American Commissioners abandon the idea of assuming it. *Even then they resolved, in the final transfer, to fix an amount at least equal to the face value of that debt, which could be given to Spain as an acknowledgment for any pacific improvements she might ever have made there not paid for by the revenues of the islands themselves. She could use it to pay the Philippine bonds if she chose. That was the American view as to the sanctity of public debt legitimately incurred in behalf of ceded territory; and that is an explanation of the money payment in the case of the Philippines, as well as of the precise amount at which it was finally fixed.*

Attention has been called to the fact that the independent governments erected in the Spanish South American colonies assumed certain obligations of the Government of Spain existing in the territories at the time of separation. Without examining the character of the liabilities so assumed, it is sufficient to consider that said liabilities were *assumed* and such assumption accomplished by the affirmative act of the new State. In nearly all of said instances the assumption of said obligations was made prior to the acknowledgment of the independence of the colony by Spain. Historically we know that the assumption of said obligations was a price paid by said colonies for independence and recognition of sovereignty. The United States was not so encumbered in the negotiations at Paris in 1898.

Most writers on international law refer in general terms to the proposition that when territory is ceded by one sovereignty to another the sovereignty securing the territory secures all the rights and privileges and assumes all the obligations of the previous sovereignty as to the territory ceded.

This doctrine is inaccurate, by reason of attempting to extend the rights and obligations of one sovereign to those of another who may be unable to receive or exercise such rights or discharge the obligations because of the character of his government. The rule is well established that "every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government and not according to those of the government ceding it."

Pollard's *Lessee v. Hagan*, 3 How. (U. S.), 212; *Vat. Laws of Nations*, b. 1, c. 19, s. 210, 244, 250, and b. 2, c. 7, s. 80.

It is impossible for the Government of the United States, under the Constitution and republican form of our government, to possess or exercise many of the rights and privileges of the sovereign of a monarchy. As is said by the United States Supreme Court (3 How., 225):

It can not be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them.

The same thing is true of the "obligations" of the previous sovereign. If the government is a monarchy, the sovereign is obliged to maintain that form of government. But such obligation would not pass to a republic. A sovereign is under obligations to enforce the laws of his state, but as is aptly stated by the Attorney-General, John W. Griggs—

Those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. (Letter to Secretary of War, July 10, 1899. 22 Op., 528.)

Take the instance of an established church or a government where church and state are combined. The highest obligation resting upon

the sovereign of such government is to protect, maintain, and promote the church as a State institution. His proudest title is "Defender of the Faith," and to deserve it such a sovereign usually stops at no endeavor. But such obligation would not pass to the United States with ceded territory, and did not attach to the United States with Alaska, Porto Rico, or the Philippines.

The United States Supreme Court say:

As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power, and the latter is involved in the former, to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect. (*Chi. and Pac. Rwy. Co. v. McGlinn*, 114 U. S., 542-546.)

The rights and privileges which pass from one sovereignty to another upon the transfer of territory are the rights and privileges of sovereignty as they are established by the laws and institutions of the government receiving the territory. The obligations incurred in like manner are the obligations devolving upon the sovereign by reason of the laws and institutions of the government to which the new sovereignty appertains. In other words, the sovereignty receiving the territory assumes the obligations of sovereignty as to the territory ceded, as such obligations are established in the government to which the territory passes.

The term sovereignty as here used means "the right which a nation has of organizing the public powers in such a way as it may deem advisable." This right includes the power to incur contract obligations, but it is not composed of such obligations. One is the power or authority; the other is the result of an exercise of the power. It is the power, the authority, that passes with ceded territory from one sovereignty to another, and it is the obligations or duties which a sovereignty owes to its subjects regarding the use of such power which passes, not the debts which the prior sovereignty has contracted for its own purposes by the exercise of that power.

If the sovereignty has lawfully pledged any portion of the territory ceded for the payment of a debt or the performance of a contract, and the benefited party has a property interest or vested right therein, such right is to be protected by the new sovereignty. But no such claim is made herein by the railway company.

Debts which are not secured by lawful liens upon the territory ceded, even though contracted for the benefit of said territory, do not become a debt of the new sovereignty. As between the two sovereigns, the one receiving the territory is under no obligation to the sovereign ceding the territory to pay any portion of his grantor's debts unless the obligation is voluntarily assumed and stipulated in the

treaty. In other words, *no legal* obligation exists requiring the discharge of the grantor's debts by the grantee in the absence of treaty stipulations so to do.

The obligation under such conditions arises in equity, if at all, and is based upon the established rule of national conduct, that the sovereign will not do injustice to an individual, and therefore will hear and consider the claims of the creditors. Therefore it is said that such debts are a charge upon the conscience of the sovereign. The force and effect of claims of this character depend upon the facts of each particular case. One fact to be considered is whether the sovereignty which created the obligation still remains in existence. If it does, and the obligation is a national one, the creditor has no claim upon the conscience of the new sovereignty. Upon this question Hall on International Law says (4 ed., part 2, chap. 1, sec. 27):

No question therefore presents itself with respect to the general rights and duties of a new State. What, however, is its relation to the contract obligations of the State from which it has been separated? \* \* \* The fact of personality of a State is the key to the answer. With rights which have been acquired and obligations which have been contracted by the old State as personal rights and obligations the new State has nothing to do. The old State is not extinct; it is still there to fulfill its contract duties and to enjoy its contract rights. The new State, on the other hand, is an entirely fresh being. It neither is nor does it represent the first person with whom others have contracted; they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account.

Thus treaties of alliance, of *guarantee*, or of commerce are not binding upon a new State formed by separation; and it is not liable for the general debt of the parent State.

In a note to this text the author says:

The case also of the creation of a new State out of part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one State to another. When the latter occurs, at least as the result of conquest, it is not usual to take over any part of the general debt of the State ceding territory. (Id., note 1, p. 99.)

The instance of Texas furnishes a precedent for guidance in this matter. Although the annexation of Texas included all its territory and terminated its sovereignty as an independent nation, the United States has never conceded that the debts of Texas existing at the time of annexation became a liability of this Government. The United States recognized the fact that said debts should be paid, and for that purpose permitted Texas to set aside 10,000,000 acres of public lands devoted to said payment. Afterwards, the United States took portions of said lands pledged to the payment of Texas debts, agreeing to pay therefor \$10,000,000, three-quarters of which sum was to be paid to holders of Texas bonds, for which her customs duties were pledged.

The claim that the United States was liable for the debts of Texas

came before the mixed commission, under the convention with England of 1853. The commission found that it did not have jurisdiction to determine the question, but an examination of the proceedings is of value. The claim was made on a bond secured by a pledge of the faith and revenue of Texas. It was admitted that the liability of the United States did not arise from the annexation of the territory, but from the fact that the United States was receiving the revenues of Texas, which had been pledged to the payment of the bonds. (Dec. of Com. Convention, 1853, pp. 405-520.)

The position of the United States was that the revenues pledged were the revenues of the *Texas* nation. That said revenues appertain to the *government* and not to the *territory*. That when Texas ceased to be a nation there ceased to be Texas revenues. That what the United States was collecting was United States revenue and a very different thing from revenues exacted by the Texas government or nation. That the difference is as substantial as the difference between the money or currency issued by the two nations.

If the United States was not willing to admit liability as to the debts of Texas, where a pledge existed, will it be willing to admit liability in the instance of the Philippines where a pledge does not exist?

*Did the guaranty of the Spanish Government become a lien upon the revenues of the island of Luzon?*

An examination of the concession or charter shows that no attempt is made therein to pledge either the public property or revenues of Luzon for the performance of said obligation of guaranty.

It is probably true that while Luzon was a Spanish dependency Spain utilized the revenues of the island in complying with the contract of guaranty, and for this purpose included the sum necessary to be paid in the annual budget of the state for the Philippines. The burden imposed upon the Philippines by the Spanish budget included not only general obligations but also sums for the various departments known as justice, war, treasury, navy, interior, and *fomento*. It would be unavailing if a soldier in the Spanish army, who had served in Luzon and whose pay was in arrears, should apply for payment to the Government now possessed of the revenue funds of the island and base his application on the fact that he had served in Luzon during the time for which he claimed pay, and that as the annual budget for the island had included an item for the war department for years he had a lien on the revenues of the island for his pay. Yet the supposed contention of the soldier would have as much merit as the contention of the company herein.

But if the Spanish Government had pledged the future revenues of the island to the performance as the contract of guaranty, such pledge would not be a lien upon the fund which this Government is now collecting.

While the negotiations of the treaty of Paris were in progress, the Spanish commission, having failed to induce the United States to

assume the obligations of Spain in regard to the debts incurred for or on account of the territory ceded or relinquished, insisted that said debts should follow the territory and be paid from the revenues thereof. Attention was directed to the fact that Spain had issued 2,990,000 hypothecary bonds of the island of Cuba, and that the royal decrees on which said bonds were issued contain the following avowal:

The new bonds shall have the direct (especial) guarantee of the customs revenue, stamp revenue of the island of Cuba, direct and indirect taxes now levied or to be levied there in the future, and the subsidiary (general) guarantee of the Spanish nation.

The bonds themselves contain the following declaration:

Direct (especial) guarantee of the customs revenue, stamp revenue of the island of Cuba, direct or indirect taxes levied or to be levied hereafter, and the subsidiary (general) guarantee of the Spanish nation.

The Spanish Colonial Bank shall receive, in the island of Cuba, through its agents there, or in Barcelona, through the Spanish Bank of Havana, the receipts of the custom-houses of Cuba, and such amount thereof as may be necessary, according to the statements furnished on the back of the bonds, to meet the quarterly payment of interest and principal, shall be retained daily and in advance.

The Spanish commission contended that said bonds evidenced a mortgage debt secured by the future revenues of Cuba. (Sen. Doc., 3d sess., Fifty-fifth Cong., No. 62, pt. 1, p. 178.)

In rejecting this proposition the American Commission say:

As to that part of the Spanish memorandum in which the so-called Cuban bonds are treated as "mortgage bonds" and the rights of the holders as "mortgage rights," it is necessary to say only that the legal difference between the pledge of revenues yet to be derived from taxation and a mortgage of property can not be confused by calling the two things by the same name. \* \* \* No more in the opinion of the Spanish Government, therefore, than in point of law, can it be maintained that that Government's promise to devote to the payment of a certain part of the national debt revenues yet to be raised by taxation in Cuba, constituted in any legal sense a mortgage. The so-called pledge of those revenues constituted, in fact and in law, a pledge of the good faith and ability of Spain to pay to a certain class of her creditors a certain part of her future revenues. They obtained no other security beyond the guarantee of the "Spanish nation," which was in reality the only thing that gave substance or value to the pledge, or to which they could resort for its performance. (Id., pp. 200, 201.)

If the contention of the American Commission is correct as to obligations wherein it is expressly declared that the revenues of Cuba are pledged to the performance of the contract, a like contention must prevail where the contract is silent as to a pledge of revenues.

The position taken by the American Commission in this matter was made known to the Executive and by him communicated to Congress. Congress ratified the treaty and the Executive approved such action. Thereby the position of the Commission was acquiesced in by the legislative and executive branches of the Government of the United States. It is not to be contemplated that the position will be adjudged untenable by the provisional government temporarily in charge of the civil affairs of the island.

The provisional government of the Philippines is bound to hold that said guaranty of the Spanish Government is not a lien upon the revenues of the islands.

*Are the revenues of the Philippine Islands, now being collected by the provisional government, burdened with a trust in favor of the Manila Railway Company?*

If the phraseology of this question is changed so as to read, "Has the railway company a proprietary interest or vested right in said revenues?" it will appear at once that the answer must be in the negative.

The claim which the company asserts is of inchoate right, even when urged against the Spanish Government, and relates to the personal obligation of that Government, being a naked promise without security.

As to such inchoate rights the Supreme Court of the United States say (*Dent v. Emmeger*, 14 Wall., 312):

But inchoate rights, such as those of *Cerre*, were of imperfect obligation and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a vitality and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by Congress they became American titles and took their legal validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence.

This doctrine has a direct application to the matter under consideration. As the case now stands the company has the obligation of the National Government of Spain. Up to this time the representatives of the United States authorized to bind it have refused to assume said obligation. The most the railway company can assert is that said obligation of the Spanish Government has now become a charge upon the conscience of the sovereign people of the United States. If it were conceded that said obligation had become a charge upon the conscience of the sovereign people of the United States, the manner in which and extent to which the duty so created is to be discharged must be determined by Congress.

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The views set forth in the foregoing report were approved by the Secretary of War and the subsequent action of the War Department on this claim and others of similar character was in harmony therewith.

**IN RE PETITION OF THE COUNTESS OF BUENA VISTA FOR RELIEF FROM A CERTAIN ORDER OF THE MILITARY GOVERNOR OF CUBA; AND THE CLAIM OF DR. DON GUSTAVO GALLET DUPLESSIS FOR SIMILAR RELIEF AND INDEMNITY.**

[Submitted August 8, 1900. Case No. 1136, Division of Insular Affairs, War Department.]

**SYNOPSIS.**

1. The authority heretofore possessed by Spanish officials to exercise the powers appertaining to offices created by the Crown of Spain for the purpose of administering the affairs of government in Cuba under Spanish sovereignty ceased upon the military occupation of the island by the forces of the United States being established.
2. The tenure of office of the Spanish officials heretofore exercising authority in Cuba is not property and therefore is not entitled to the protection to rights of property guaranteed by Article VIII of the treaty of peace.
3. Although the Crown of Spain was accustomed to sell a perpetual incumbency of certain of its offices, among them that of high sheriff of Habana, such right of incumbency was at all times subject to the higher right of the sovereign to re-assume the exercise of the authority of the office whenever the public welfare required it.
4. The claim for indemnity for being deprived of said incumbency depends upon the terms of the contract with Spain; and as this contract was the personal contract of the Spanish State, its obligations did not pass with the transfer of sovereignty, and they were not assumed by the United States.
5. Whether or not the obligations of the Government of Spain incurred in Cuba are to be assumed by the government established by the people of Cuba is a question to be determined by that government when it assumes the exercise of independent sovereignty.
6. Whether or not the municipality of Habana became liable for the payment of indemnity in said matter by reason of proceedings had prior to the military occupation is a question which may properly be referred to the courts of Cuba.

SIR: I have the honor to acknowledge the receipt of instruction to report on the above-entitled matters, and in response thereto I have the further honor to submit the following:

The facts out of which the controversy arises, as claimed by the complainants, are as follows:

In the year 1728 Don Sebastian Calvo de la Puerta bought at public auction, from the Spanish Crown, the office of "Alguacil mayor," or high sheriff, of the city of Habana. The office was declared to be perpetual and capable of passing by inheritance in the direct male line of descent and of being alienated by purchase and sale under certain conditions.

Upon the death of the purchaser aforesaid, the office and its emoluments passed by descent to his grandson, Don Francisco Calvo de la Puerta, whose title received royal confirmation by letters patent, dated May 22, 1783.

Eventually, the male issue of the incumbent of the office having become extinct, the office passed, by the permission of the Spanish



Crown, to the Count O'Reilly, who was the husband of the daughter of the then recently deceased high sheriff.

From the Count O'Reilly the office descended to his heirs and successors, with the approval in each case of the Spanish Crown, to the present Countess O'Reilly y Buena Vista, on whose behalf this proceeding is instituted.

The duties of the high sheriff of Habana were originally divisible into two general classes—national and municipal. In the performance of the duties classified as “national” the high sheriff of Habana resembled the United States marshal of a Territory of the United States. He was an executive officer of the courts, and writs of all classes were served by him or his deputies. For such services he was entitled to fees fixed by law.

His municipal duties resulted from the fact that he was, *ex officio*, a member of the “ayuntamiento” or city council of Habana and charged with the duty of inspecting the meat supplied to the city and given supervision of the slaughterhouse where the cattle were required to be killed, and had charge of the transportation of the carcasses from the slaughterhouse to the dealers, also the disposal of the refuse, and was required to inspect the weights.

For the performance of these duties he was authorized to exact a fee of 5 “reales fuertes” for each head of large cattle killed in the slaughterhouse of Habana and cartage for hauling the meat. Later the fee for the cattle killed at the slaughterhouse varied in accordance with the times, but was fixed by law. The last rate fixed was 62½ cents per head.

The complainants allege that their privileges connected with the slaughter of cattle were worth to them “in the neighborhood of \$100, net, per day” at the time they were deprived thereof.

At this point in the review it is proper to explain the interest asserted by Dr. Don Gustavo Gallet Duplessis.

By appropriate provisions the Spanish law permitted the seizure and sale by judicial procedure, to enforce the payment of private indebtedness, of a one-half interest in the emoluments of the privileges appertaining to the slaughterhouse industry possessed by the high sheriff of Habana. Pursuant to said law, Dr. Don Gustavo Gallet Duplessis purchased, at judicial sale, a one-half interest in said emoluments on September 19, 1895, and entered upon the enjoyment thereof.

Upon the American occupation of Habana being established, the military authorities of the United States refused to allow the Countess of Buena Vista and Dr. Don Gustavo Gallett Duplessis to exercise the authority or enjoy the emoluments appertaining to the office of high sheriff of Habana.

Thereupon the interested parties had recourse to General Ludlow, as military governor of the city of Habana, for recognition of their asserted rights, and reinstatement therein. This being denied, they appealed to Major-General Brooke, then military governor of Cuba, for the relief desired. Major-General Brooke refused to recognize their claim or to order reinstatement, and thereupon appeal is made to the Secretary of War.

The relief demanded by the Countess of Buena Vista, as set forth in the prayer of her petition, is as follows:

Your petitioner being thus deprived \* \* \* humbly prays, the premises being considered, that the aforesaid orders be revoked, your petitioner be reinstated in all his property, rights, and privileges, of which said orders deprived him, and that the military governor of Habana be directed to account to and pay over to your petitioner all the moneys of which he has been deprived as aforesaid from the date of such deprivation until he shall be actually repossessed of his property and privileges, or duly indemnified therefor, and that he have such other and further relief as may seem proper. (Doc. 5, p. 6; printed brief.)

(NOTE.—In this proceeding the Countess of Buena Vista is represented by her husband, J. Y. Camara. Hence the use of the pronoun "he.")

The demand made by Dr. Don Gustavo Gallet Duplessis, as stated by his counsel, is—

1. The repeal or nullification of the orders of the military governor of Habana of May 20, 1899, and of the military governor of Cuba of August 10, 1899, to which this communication refers, and the restoration of all things in connection with the hereditary rights of the O'Reilly family of Habana, and the office of high sheriff of that city, to the status quo existing on the 11th of April, 1899, when, through the proclamation of the treaty of peace with Spain, the abandonment by Spain of all claims of sovereignty over and title to Cuba became an accomplished fact, and the Cuban people became free and independent.

2. The payment by the Government of the United States of all moneys of which Dr. Don Gustavo Gallet Duplessis has been deprived, at the rate of sixty-two dollars and a half per day from the 1st of June, 1899, in which the order of the military governor of Habana of May 20, 1899, went into effect, until the day of the repudiation and repeal of that order and of the order of the military governor of Cuba of August 10, 1899. (See pp. 21, 22, printed brief of Dr. J. I. Rodriguez, counsel for Doctor Duplessis.)

The complainants contend (1) that said office is property; (2) that said property belonged to them on April 11, 1899, when the ratifications of the treaty were mutually exchanged; (3) that since that date they have been deprived of said property by the action of the military government of Cuba; (4) that such deprivation contravenes the provisions of article 8 of the treaty of peace with Spain, and international law.

The learned and distinguished counsel who represent the complainants present elaborate arguments, which are entitled to careful examination and serious consideration, not only because of the arguments themselves, but of the high professional standing of the authors.

There are also on file herein a number of reports or opinions on ques-

tions involved in this controversy submitted by Spanish, Cuban, and American lawyers, in opposition to the claims of the complainants. In common with those on behalf of the complainants, these arguments show a wealth of knowledge and extended research.

The attention and consideration of the Secretary is thus specially directed to the argument of the complainants, instead of submitting a synopsis thereof, as being better calculated to protect their interests, as I feel compelled to report that their argument rests on premises assumed to be correct, but which appear to me as being impossible of demonstration. They are as follows:

1. That complainants were possessed of the rights now asserted and entitled to exercise them on April 11, 1899.

2. That said office itself was and is property, and now belongs to complainants.

If, from the laws of war and nations, or the purpose for which the military invasion of Cuba was undertaken by the United States, it results that the authority of complainants to administer said office ceased upon the establishment of military occupation of Habana, or the office itself became *functus officio*, it follows that the abrogation of rights now complained of was accomplished by the success of the invasion and not the action of the military government, which action must be held to be simply declaratory of an existing condition and not as creating said condition.

While it is denied herein that the tenure of office of the Spanish officials heretofore exercising authority in Cuba is property, the proposition is advanced that if it were "property" it was property which, being in the track of war, was destroyed thereby, and, being destroyed, is not within the protection of article 8 of the treaty. If relief is to be afforded the complainants under the treaty, such relief arises from article 7 and not article 8.

With this general statement of the purview of this report, examination is made of the several questions embraced therein.

Were the complainants possessed of the rights now asserted, and entitled to exercise them, when the ratifications of the treaty were exchanged on April 11, 1899?

It appears herein that the Spanish Government had adopted a policy for the abolishment of this and similar offices. But the Spanish Government recognized the right of the incumbents to secure indemnity for the deprivation of the incumbency and its emoluments. As to the office of high sheriff of Habana, proceedings were pending to ascertain the amount of such indemnity at the time the American invasion of Cuba occurred, and pending the ascertainment and payment of the indemnity the incumbents were permitted to enjoy the emoluments. Therefore the question will be considered as though the office were one of the fixed and firm governmental institutions of Spanish sovereignty in Cuba.

The complainants insist that they were deprived of their office by the action of General Ludlow, military governor of Habana, in issuing the order dated May 20, 1899, and the action of Major-General Brooke in sustaining said order.

It seems plain, to the writer, that the complainants have overlooked the real instrument of their undoing. Their individual or personal right to exercise the authority pertaining to the office of high sheriff of Habana and to enjoy the emoluments of said office was placed in jeopardy by the war between Spain and the United States and abrogated when the city of Habana became subject to military occupation by the forces of the United States.

The general rule deducible from the laws of war is that the authority of the local, civil, and judicial administration is suspended, as of course, so soon as military occupation takes place, although in actual practice it is not usual for the invader to take entire administration into his own hands; but the omission is an act of grace on the part of the invader.

Lieber's Instructions for the Government of Armies of the United States in the Field, section 1, paragraph 6, lays down the rule as follows:

All civil and penal *law* shall continue to take its usual course in the enemies' places and territories under martial law (military government), unless interrupted or stopped by order of the occupying military power; *but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law (military government), or continue only with the sanction or, if deemed necessary, the participation of the occupier or invader.*

I understand this instruction to mean that it requires an affirmative act of the invader to abrogate the civil or penal *laws*, but the authority of legislation, execution, and administration of all laws passes to the military occupant as a result of the occupation and without further affirmative act or declaration. Should he thereafter desire to confer the right to exercise any or all of said powers upon the persons previously exercising them, or other persons, an affirmative act is necessary.

If this is the correct view, it follows that upon the military occupation of Habana by the forces of the United States being established, the authority theretofore possessed by these claimants by virtue of said office passed, *ipso facto*, to the military occupier and will remain there so long as the occupation continues, to be exercised or not, as the occupier shall determine.

I take this to be the rule even when it is conceded that the office does not become *functus officio* as a result of military occupation.

I see no reason why an exception should be made to this general rule in the instance under consideration. The fact that the term of office was perpetual does not give exemption, for the principle is the same as is involved where the term is for life, a series of years, during

good behavior, or at the royal pleasure. If the former incumbents of this office may rightfully demand restitution and indemnity, why may not any other Spanish officer demand similar treatment at the hands of the military government?

The next question is, Did the establishment of military occupation in Habana render the office known as high sheriff of Habana *functus officio*?

If the high sheriff of Habana was an officer of the Crown of Spain, similar in character to that of the Spanish Governor-General of Cuba or the Spanish governor of the province of Habana, it would seem unnecessary to produce argument to show that, upon the military occupation of Habana being established, the office and appurtenant rights, privileges, and authority passed away with the sovereignty upon which the office depended and of which it was an instrument, agent, or vassal. If the officers of the previous sovereignty remain in office and continue to exercise the powers derived from the previous sovereignty, wherein has the previous sovereignty been displaced?

The invasion of Cuba by the military forces of the United States was undertaken and the military occupation of Habana established for the purpose of compelling the Spanish Government to comply with the demand of the United States—

That the Government of Spain at once relinquish its authority and government in the island of Cuba. \* \* \* (Joint resolution of Congress, April 20, 1898. See 30 U. S. Stats., p. 738.)

To what end and purpose were the military operations in Cuba if, at the end of a successful invasion, the instruments of the Government of Spain possess a vested right to continuance in place and power?

Even if not justified by the laws of ordinary war, the military government established by the United States in Cuba is fully justified in considering as ended all authority of all agencies of the Government of Spain in Cuba, for that is what the military forces of the United States were ordered to do by the sovereignty they serve. (See joint resolution of Congress, 30 U. S. Stats., 738, 739.)

The purpose of the invasion being to render all branches of the Government of Spain in Cuba *functus officio*, the success of said invasion must of necessity be held to accomplish said purpose.

Do the laws of nations and of war prohibit the abrogation of said office and its appurtenant rights and privileges?

The harsh rule still prevails that "the will of the conqueror is the law of the conquered." The application of this rule in modern usage has robbed it of its terrors. But it is the rigor of the *application*, not the rule, which has been mollified. The belligerent seeing fit to enforce the rule, has the right to do so. The United States in maintaining military occupation in Cuba and the resulting military government

has applied this rule in its mildest form. Such municipal laws (being the laws regulating the relations sustained by the inhabitants to each other) as were compatible with the existing conditions have been retained, as were also, temporarily, such instruments for their administration as the military authorities deemed expedient. The political laws (being the laws regulating the relations theretofore sustained by the inhabitants to the prior sovereign) were held to be abrogated, as was also the authority of those who previously administered said laws. In a letter to the Secretary of War, dated July 10, 1899, the Attorney-General says:

By well-settled public law, upon the cession of territory by one nation to another, either following a conquest or otherwise, \* \* \* those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty.

By parity of reasoning it would seem to follow that officials whose authority was derived from said laws and whose duties consisted in administering said laws would cease to possess their former powers when said laws passed away. The ground on which they stood is cut from beneath them.

The question thus raised herein is, Was the office of high sheriff of Habana political in character, and did it pertain to the prerogatives of the Spanish Crown?

In a general sense all administrative offices are political. This fact is the basis of the section above quoted from Lieber's Instructions. An examination of the origin and tenure of the office under consideration and the powers exercised in the administration thereof will, it is believed, show that said office was especially and peculiarly political.

The office was created and the right to administer its functions disposed of by an exercise of one of the prerogatives of the Spanish Crown. In Law 1, Title 20, Book 8 of the *Recopilación de Indias*, which contains the Real Cédulas from 1522 to 1645, it is stated:

As one of the greatest and best known prerogatives of our royal preeminence and dominion is the creation and provision of public offices, so necessary for the good administration of justice, and without which the Republic can not live, and so important for the government of our States and the dispatch of the many and varied matters which arise, and said offices being of two kinds, some with jurisdiction and others with some participation therein, which do not have it directly, and as the general and public necessities require the sale of the second kind for the enrichment of our royal treasury, those of the first class being reserved; and because at the time of the Catholic kings, our predecessors, some offices were created which were given and granted as a grace to worthy subjects of our Royal Crown and could afterwards be sold or disposed of as they became vacant, and could be renounced, it is our will, and we order, that the following offices shall be salable and renounceable, this order to be observed in the same manner as our previous general and special decisions: *Alguaciles mayores* of audiencias, *escribanos de camara* of the audiencia, etc., "there being included in the statement all kinds of *escribanos*, the *alguaciles mayores*, and *regidores* of cities, *procuradores* and *tasador* and *repartidor* of causes."

The office being created was conferred upon the individual who purchased the authority to administer it, but the Crown always retained the title and power to control the disposition thereof. The purchaser received a beneficial interest, which was at all times subject to many limitations and might lapse or become forfeit in many ways, in which event his interest reverted to the Crown.

In the royal cédula of October 15, 1787, it is stated:

Taking into consideration that, although the incumbents of offices which can be sold and renounced have the indirect ownership, with the limitations prescribed by law, they are not authorized to dispose of the same at will as any estate of their patrimony, because my Crown always preserves the direct ownership (*dominio directo*), with a possible right of reversion thereto for different causes which may arise, \* \* \* I have decided to forbid, as a general rule, any imposition of annuities or other charges on salable and renounceable offices of my Kingdoms of the Indies. \* \* \* And finally I declare that there can not be attached more than one-third of the emoluments and fees of said offices for the debts of their incumbents.

(NOTE.—“*Dominio directo*: Authority or privilege of disposal which a person retains in a thing or estate which he has given in *emphyteusis*.”—Dictionary of the Spanish Academy.)

As has already been stated, the high sheriff of Habana was authorized to serve court writs. In so doing he acted as the representative of the Crown. Since the sovereignty, whose representative he was in such matters, no longer exercises judicial authority in Cuba, the powers of the high sheriff relating thereto have been cut off at their source.

The same is true of the powers exercised in connection with the slaughterhouse industry. They are powers included in what is known as the police power of the State. As to Cuba under Spanish dominion, the “State” was the Crown of Spain, or Imperial Government of the Spanish Peninsula. The undefinable, indeterminate authority called “the police power of the State” is one of the highest and most despotic powers of sovereignty. So important and unlimited is this power that sovereignty can not divest itself thereof. Strictly speaking, it can not *delegate* it. The sovereign may, however, designate officials who may exercise it for him, but in such exercise said officials act for and on behalf of the sovereign and by virtue of the power vested in the sovereign. They do not share in the right or prerogative. They are the instruments by which the prerogative is exercised. If by any means the sovereign is divested of the prerogative, the instrument is thereby rendered ineffective. The Crown of Spain may no longer exercise prerogative rights in Cuba, and its instrument, the high sheriff of Habana, has no greater rights than are possessed by his principal.

If the foregoing views are correct, it follows that the office of high sheriff of Habana was political in character and became *functus officio* upon the establishment of military occupation in Habana.

If said office were to be reestablished, it must be or become an instrument or agency of the sovereignty now being exercised by the

military government. It can only become such instrument by an act of grace on the part of the military occupier conducting said Government.

The complainants herein do not ask for an act of grace. Their demand is one of *right*. To comply with such demand involves the admission by the military government of Cuba that the sovereignty of the island is still lodged in the Crown of Spain and the instruments of Spanish Government are now entitled to exercise authority in Cuba.

The military government existing in Cuba depends for its justification upon the proposition that the sovereignty of the island is vested in the people of Cuba. This proposition was declared by the Congress of the United States, speaking for the sovereignty of this nation; it was sustained by the force of American arms and confirmed by the treaty of Paris.

Pursuant thereto, the military government in Cuba has reorganized the municipal government of Habana, and based it upon the sovereignty possessed by the people, and installed municipal officials whose title to office is derived from that sovereignty and conferred by an exercise of the right of franchise expressed by popular vote.

To comply with the demand now made by complainants and to permit the high sheriff of Habana, or the incumbent of said office, to again assume a seat in the city council and exercise the powers and authority of a member thereof, would be to recognize a dual sovereignty in Cuba, two sovereignties in one jurisdiction.

Theoretically, at least, the city council of Habana would then consist of members elected by the people and other members whose title to office originated with and was derived from the Crown of Spain, by virtue of a sovereignty vested therein. Such member would represent the Crown of Spain and act by virtue of the sovereign powers thereof. Since the Crown of Spain had declared the office perpetual and to pass by inheritance and sale, such office could not be dispensed with except by ransom, and the right of the inhabitants to govern themselves could be bartered and sold by an individual. It seems hardly possible that the United States will require the people of Cuba, domiciled in Habana or elsewhere, to ransom the right of self-government from Spanish officeholders after voluntarily undertaking to wrest that right from Spanish sovereignty by force of arms.

The same incongruity will be noticed in connection with that portion of the demand relating to the courts of Cuba and the claim of authority to serve court writs.

The courts of Cuba as now constituted do not represent Spanish sovereignty. They represent the sovereignty exercised by the military government. Whether that sovereignty is the sovereignty of the United States or the sovereignty vested in the people of Cuba is not involved herein. It is sufficient that it is not the sovereignty from



which the high sheriff of Habana derived his authority, nor the sovereignty whose prerogatives said officer was authorized to exercise. It is true that for a time, probably in many instances continuing to the present, the offices created and the officers installed in Cuba by the Crown of Spain were permitted to continue their functions by the military government. But in so doing the military government consulted its own convenience and necessity. Such act was an act of grace and did not result from any right possessed by the Spanish officer. It is apparent from the record herein that the military government of Cuba has refused such act of grace in the instance of the high sheriff of Habana.

Are the rights asserted by the claimants rights of property and protected by the provisions of the treaty of peace?

The claimants strenuously insist that the rights asserted by them and possessed by them while Spanish sovereignty prevailed in Cuba are property rights, and as such are protected by the treaty of Paris (1898).

In so doing, it seems to the writer, the complainants fail to observe the distinction between the *incumbency* and the *office* itself. They confuse the fees with the authority to perform the services for which the fees are exacted. An officer has a property right in and to the fees arising from services performed pursuant to his right of incumbency, but not to the office itself.

That a public office is the property of him to whom the execution of its duties is intrusted is repugnant to the institutions of our country, and is at issue with that universal understanding of the community which is the result of those institutions. Public officers are, in this country, but the agents of the body politic, constituted to discharge services for the benefit of the people under laws which the people have prescribed. So far from holding a proprietary interest in their offices they are but naked agents without an interest. As public agents they are intrusted with the exercise of a portion of the sovereignty of the people—the *jus publicum*—which is not the subject of grant, and can be neither alienated nor annihilated, and it would be a repugnant absurdity, as incomprehensible as it would be revolting, that they can have a private property in that sovereignty. (*State v. Dews*, R. M. Chart. (Ga.), 397,400).

Careful examination convinces me that this principle may properly be applied to the office of high sheriff of Habana, under Spanish sovereignty. As stated in the royal order of October 15, 1787, the title and power of disposal of said office was retained by the Crown. The purchaser received only the right of administration. The right of administration consisted of an agreement on the part of the Crown of Spain that complainants should be and continue the instrument of the Crown for the exercise of certain prerogatives in Cuba. While the *office* was declared to be perpetual, the *incumbency* was subject to the royal will, and might at any time be terminated at the royal pleasure, subject only to the condition that if the Crown exercised said right

the incumbent should be indemnified for the loss of his incumbency. Such termination of incumbency was not an exercise of the right of eminent domain. It was an exercise of the right of sovereignty to choose the instruments for the discharge of public duties devolving upon it. Sovereignty can not evade these duties, and therefore can not divest itself of the powers nor the right to exercise the powers required for their performance. For instance, an individual can not secure a vested or property right to control the operation of martial law; neither can he secure a vested right to exercise the police power of the State; nor the judicial discretion. (*Butchers' Union v. Crescent City, etc., Co.*, 111 U. S., 746, 751.)

I do not think the Spanish Government contemplated or undertook to convey a property right in and to said office when it sold the privilege of administering it.

There is an evident and essential difference between power and property; between the authority of an officer and the property of an individual. A grant of property passes from the grantor his entire power over it. A grant of power implies that it still resides in the grantor, and excludes all interference with his right to exercise it.

I think the true theory is that the rights of the complainants were inchoate rights of contract, not vested rights of property. The original incumbent of the office secured a contract from the Crown of Spain, paying therefor a valuable consideration, whereby the Crown of Spain agreed to permit him, his heirs, and his assigns, to administer said office within a prescribed jurisdiction. As a result of action taken by another and independent sovereignty, which Spain resisted to the extent of war, the Crown of Spain was thereafter unable to carry out the obligations of said contract binding upon it.

This contract, in all its parts, was subject to the superior right of the public to terminate it at any time the public necessity required such action. The purchaser entered into the contract with implied knowledge of this superior right, and any loss or burden occasioned him by its enforcement "results from the application of those principles by which the public good is to be consulted and promoted," and is *damnum absque injuria*. (*Spring v. Russell*, 7 Greenl., 273; *Charles River Bridge v. Warren Bridge*, 7 Pick., 459, 472; *Lansing v. Smith*, 4 Wend., 9; *Callender v. Marsh*, 1 Pick., 410; *Coates v. Mayor of New York*, 7 Cow., 585; *People v. Livingstone*, 6 Wend., 526.)

This right of the public being part and parcel of the contract, its enforcement does not constitute a violation of the contract.

The administration of this office consisted in exercising certain prerogatives of sovereignty. The contract herein did not attempt to divest the sovereignty of said prerogatives and vest them in the incumbent of said office. Had such attempt been made it would not have been binding upon the sovereignty agreeing thereto. At any time the

public welfare required it, the sovereignty could have repossessed itself of the right to exercise such prerogatives. (*Boyd v. Alabama*, 94 U. S., 645; *The Beer Company v. Massachusetts*, 97 U. S., 25, 28; *Fertilizing Company v. Hyde Park*, 97 U. S., 659; *Stone v. Mississippi*, 101 U. S., 814; *Butchers' Union v. Crescent City, etc., Co.*, 111 U. S., 746.)

In *Stone v. Mississippi* (101 U. S., 814) the court say (p. 817):

All agree that the legislature can not bargain away the police power of a State.

And further say (p. 819):

No legislature can bargain away the public health or the public morals. The people themselves can not do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation and can not divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself.

That this rule prevailed in Spain is shown by the royal order of November 11, 1816, which declares the right of the crown to repossess itself of these purchased offices, notwithstanding the clause in the certificate of appointment, or patent of office, guaranteeing immunity from such exercise of authority.

The royal order of November 13, 1817, declares:

ARTICLE 1. All the offices *belonging to the Crown* which have been disposed of are revertible to the Crown, and may be repurchased, although they have been sold with the proviso that they were to be perpetual and that they might not be repurchased, and notwithstanding any provision that may seem to prohibit it.

In these two royal orders no reference is made to indemnity. The only provision to the advantage of the incumbent is one giving him a preference in the repurchase.

The word "repurchase," as used in said orders, is shown by the context to mean a repurchase by individuals, not a repurchase by the Crown, as a condition precedent to repossession. The purpose of the orders is to *resell* the offices, and the orders provide that the sums realized from said repurchases shall be turned over to the department of public credit and devoted to reestablishing said credit.

The royal order of January 21, 1819, declares:

ARTICLE 1. All the offices of my Crown, which have been disposed of for a price, may be incorporated even though they have been sold with the clause of perpetuity or of any other that prohibits it.

It was the practice of the Spanish Crown to assert its right of ownership over these offices, from time to time, by divesting them of certain powers and functions, and finally the Cortes decreed and the Crown approved that the Government should abolish said offices, "thus releasing the people from this burden." (Law of July 14, 1842.)

At all times, when a transfer of said offices was to be accomplished,

either by purchase or inheritance, it was necessary to secure the assent of the Crown thereto. These powers are incompatible with the idea of a property right in the incumbent.

Much less is such contract binding upon a new sovereignty established in the territorial jurisdiction by operation of war. Let us suppose that the office involved was the judge of a court, instead of the marshal. Would it seem possible that a sovereignty established by conquest was bound to submit its sovereign judicial powers to the discretion of a person who had purchased the right to exercise such discretion from the expelled sovereign? Or to recognize a right to sell and dispose of said judicial powers based on a contract or any obligation created by said prior sovereign?

If authority for a negative answer is required, it may be found in *Bank of Columbia v. Oakley*, 4 Wheat., 244-245; *Hawkins v. Barney*, 5 Pet., 466-467; *Fletcher v. Peck*, 6 Cranch., 143.

Sovereignty of ceded territory is not burdened with the personal contracts entered into by the State from which the territory is severed. (Hall on International Law, 4th ed., sec. 27.)<sup>a</sup>

But suppose we concede that the complainants did have such an interest in this office as constituted property. It must then be considered that it was property situated in the track of war, and being destroyed by war the owner must endure the consequences. He is not entitled to indemnity from the invader nor the military occupier.

If the true theory is that the rights of the complainants terminated when the military occupation was established, it follows that since the military occupation of Habana occurred on January 1, 1899, the complainants were not possessed thereof when the treaty became effective as to private rights, upon the mutual exchange of ratifications April 11, 1899.

So far as it affects individual rights a treaty is not concluded until exchange of ratifications. (*United States v. Arredonda*, 6 Pet., 691; *United States v. Sibbald*, 10 Pet., 313.)

Therefore the rights of the complainants are not protected by the provisions of article 8 of the treaty, for they had passed away before the treaty became effective as to them. The complainants stand in the same situation as the owners of property injured or destroyed in the bombardment of Santiago or the invasion of Porto Rico.

Article 8 of the treaty was not intended as a guaranty of indemnity. It provided for protection of existing rights, not the restoration of destroyed ones. As to property and rights destroyed by the war, provision was made for compensation as set forth in article 7 of the treaty, as follows:

ARTICLE VII. The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its

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<sup>a</sup> See *ante*, page 178 *et seq.*

citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

It is to article 7 and not to article 8 the complainants must look for relief.

There remains for consideration the claim of indebtedness.

As already stated, an owner is not entitled to compensation for damages or loss to property taken or destroyed during war.

The basis of the claim of indebtedness herein is that the rights and privileges of the complainants were abrogated by the Spanish Government *before the war*; that said abrogation created an indebtedness in favor of these complainants and against the Spanish Government, and that the obligation to pay said debt passed to the succeeding sovereignty in Cuba.

When a sovereign displaces one of the instruments for the exercise of prerogatives the question of indemnity is to be determined by the discretion of the sovereign. It addresses itself to the conscience of the sovereign. The right is grounded in equity until acknowledged or declared existing by the sovereign.

The opposition to the policy of disposing of the incumbency of offices by sale, and the agitation against it in Spain and the Spanish colonies are of long duration. Naturally the incumbents desired to preserve their privileges or to receive indemnity. As already noted, the royal orders of 1812 and 1813 did not provide for such indemnity. This would excite the enmity of the incumbents and decrease the amount to be realized by the Government from the new sales.

The royal order of June 12, 1822, recognized the right of indemnity, and on May 10, 1837, the Cortes passed the following resolution:

The following persons are recognized as creditors of the State, viz, all owners of public offices which have been disposed of by the Crown for a consideration and which have been abolished *as being incompatible with the Constitution and the law*.

If Spanish sovereignty had continued to exercise dominion in Cuba, the situation would be as follows:

The office of high sheriff of Habana would be "abolished as being incompatible with the Constitution and the law," but the complainants would be permitted to enjoy the emoluments until they were paid an amount due them as "creditors of the State." This was a debt, a personal obligation of the Government of Spain, arising on action taken by said Government in abolishing said office, originating in equity and acknowledged by the Cortes with the approval of the Crown.

This presents the following question: Did the obligation to pay this personal indebtedness of the Spanish Government pass to the United

States upon assuming sovereignty in Cuba in trust for the inhabitants of the island?

The answer to this question is found in the fact that in the negotiations at Paris in 1898 the United States refused to assume the financial obligations binding upon Spanish sovereignty in Cuba.

Were the fact otherwise and the liability of the United States admitted, payment could not be made by this Department. There are no funds of the United States at the disposal of the War Department for the payment of claims of this character against the United States. The Congress must furnish relief in such cases. The complainant would be obliged to look to Congress for relief if the treaty specifically required the United States to pay such indemnity or if the obligation unquestionably passed to the United States by operation of international law.

The position taken by the United States in regard to the transfer of liability for indebtedness of the Spanish Government incurred in Cuba is, that questions relating thereto are to be referred to and determined by the future permanent government of the island when that government assumes the exercise of independent sovereignty.

The high sheriff of Habana was a "double office;" i. e., it was national and municipal. The law for the reorganization of the municipal councils of Cuba (July 27, 1859) contained the following:

ARTICLE 98. Municipalities having purchasable and assignable offices yielding emoluments or fees of any kind whatever shall at once proceed to collect all the information necessary to enable the proper authorities to fix, according to the rules made and provided for the appraisement of double offices, their sale at public auction, and the payment to the royal treasury of the taxes which may be due, what amount shall have to be paid by each; and they shall recommend the manner and form of raising the funds which may be necessary for that purpose, with the understanding that the aforesaid fees and emoluments shall then become municipal property, subject to the provisions made for their preservation or increase.

The complainant, Dr. Don Gustavo Gallet Duplessis, insists that by reason of the foregoing and other provisions of the Spanish law, and the proceedings heretofore had in the matter of abolishing said office and fixing the amount of indemnity, the city of Habana is indebted to him in the amount of one-half of the value of the emoluments of the municipal office, *ex officio* appertaining to the high sheriff of Habana.

If I understand this claim, it is based upon the theory that, while Spanish sovereignty prevailed in Cuba, the indebtedness then existing against the Spanish State was duly and lawfully transferred to and became binding upon the municipality of Habana; that by reason thereof the city of Habana was indebted to him at the time the military occupation took place, which indebtedness he now seeks to collect.

The attention of the Secretary is directed to the fact that the municipality of Habana is a municipal corporation which may be sued in

the courts of Cuba, provided the inhibition contained in order of the military government dated Habana, March 21, 1899, is removed.

It would seem better to test the merits of this claim of indebtedness in a court of competent jurisdiction instead of having it passed upon by the military authorities.

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The Secretary of War determined this application, pursuant to the foregoing report, as follows:

*In the matter of the application of the countess of Buena Vista for revocation of certain orders of the military governor of Cuba.*

I can not assent to the proposition that the right to perform any part of the duties, or receive any part of the compensation attached to the office of sheriff of Habana under Spanish sovereignty, constituted a perpetual franchise which could survive that sovereignty. The fact that the Spanish Crown permitted an office to be inherited or purchased does not make it any less an office the continuance of which is dependent upon the sovereignty which created it.

The services which the petitioner claims the right to render and exact compensation for are in substance an exercise of the police power of the state. The right to exercise that power under Spanish appointment or authority necessarily terminated when Spanish sovereignty in Cuba ended. It thereupon became the duty of the military governor to make a new provision under which this part of the power of the new sovereignty, which took the place of the sovereignty of Spain, should be exercised and the necessary service rendered to the public. The petitioner has been deprived of no property whatever. The office, right, or privilege which she had acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended.

The question whether by reason of anything done before that time the right to compensation from the municipality of Habana has arisen is a question to be determined by the courts of Cuba.

The application for the revocation of the order heretofore made herein by the military governor of Cuba is denied.

ELIHU ROOT,  
*Secretary of War.*

DECEMBER 24, 1900.

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*In the matter of the application of Dr. Don Gustavo Gallet Duplessis for revocation of certain orders of the military governor of Cuba.*

This application is covered by the decision upon the petition of the Countess O'Reilly and Buena Vista for the revocation of the same orders, and the application must be denied.

ELIHU ROOT, *Secretary of War.*

DECEMBER 24, 1900.

**THE RIGHT OF THE GOVERNMENT OF THE PHILIPPINE ISLANDS,  
INSTITUTED BY THE PRESIDENT OF THE UNITED STATES, TO  
REGULATE COMMERCIAL INTERCOURSE WITH THE ARCHIPELAGO;  
AND, AS AN INCIDENT TO SUCH REGULATION, TO IMPOSE  
IMPORT AND EXPORT DUTIES.**

[Submitted November 18, 1901. Case No. 1244, Division of Insular Affairs, War Department. Printed as War Department publication by order of the Secretary of War.]

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SYNOPSIS.

1. The right of the Government of the Philippine Islands, instituted by the President of the United States, to regulate commercial intercourse with that archipelago, is justified as an exercise of the war powers of the nation in territory affected by an insurrection.

2. The right to exercise the war powers of the nation does not turn upon the question as to whether or not the territory is foreign, but whether or not the territory is hostile.

3. The President is authorized to determine the question as to whether or not existing conditions render territory hostile, and his determination thereof is binding upon the courts.

4. The customs duties levied on imports and exports at the ports of said archipelago are to be considered and justified as—

(a) Conditions imposed upon the privilege of trading with hostile territory. (*Hamilton v. Dillin*, 21 Wall., 73.)

(b) Regulations of trade with hostile territory. (*Ibid.*)

(c) Military contributions in territory wherein the United States is conducting military operations against an armed insurrection.

(d) Revenue measures adopted by the Government of territory subject to military occupation.

5. The war powers of a nation are not subject to the limitations and control of its domestic laws and Constitution.

6. The discretion of the President in the exercise in hostile territory of the war powers of the United States for the enforcement of measures intended to suppress an armed insurrection against the authority of the United States, is not subject to the control of the judicial branch of this Government.

7. The legislative branch of the Government of the United States may participate in the exercise of said war powers.

8. By the legislation known as the "Spooner amendment" Congress confirmed the authority of the Philippine government to adopt and enforce appropriate measures for the administration of the affairs of civil government in territory subject to its jurisdiction.

9. The "Insular cases" (182 U. S.) determine that in legislating for Porto Rico under the conditions of peace Congress is not bound by the limitations imposed by the Constitution on legislation for the States of the Union. A like liberty respecting insular matters is possessed by the governing authority in the Philippines which Congress has recognized as possessing legislative authority.



10. The Constitution (Art. I, sec. 10, par. 2) permits export taxes to be levied by the concurrent action of a State and Congress. In the Philippines the national authority of the United States may exercise all the powers of both Federal and State Governments.

11. Under the distribution of powers among the several branches of the Government of the United States, the authority to fix and determine the relations sustained to the Federal Government, by territory and inhabitants not included in the original thirteen States, is vested in the political branch until such territory is made a State of the Union. The late treaty with Spain recognized and declared this authority to be so vested.

WAR DEPARTMENT, OFFICE OF THE SECRETARY,  
DIVISION OF INSULAR AFFAIRS,  
*Washington, D. C., November 18, 1901.*

SIR: I have the honor to acknowledge the receipt of your request to prepare and submit a report on the question of the right of the Government of the Philippine Islands, instituted by the President of the United States, to regulate commercial intercourse with that archipelago, and, as an incident to such regulation, to impose import and export duties.

In compliance with your request, I have the honor to submit the following:

I. THE AUTHORITY OF THE UNITED STATES TO EXERCISE BELLIGERENT RIGHTS IN DEALING WITH THE INSURRECTION IN THE PHILIPPINE ARCHIPELAGO.

The customs duties exacted by the government of the Philippines are enforced by an exercise of belligerent right. The authority for such exercise arises from the conditions existing in the islands. There prevails in said archipelago an insurrection against the sovereignty of the United States and authority of the existing government, of such magnitude and extent as to require set military operations by the military forces of the United States for its suppression. While engaged in suppressing such insurrection, the government may properly exercise the rights of a belligerent. It is true that Congress has not formally declared war against the forces of the insurrection in the Philippines. A war originating in insurrection against lawful authority is never formally declared. An insurrection becomes a war by reason of its attendant circumstances, the number, power, and operations of the persons who originate it or engage therein. (The Prize Cases, 2 Black., 635.) War is a condition, not an act of the legislature.

In sustaining the right of the Federal authorities to blockade the ports of the late rebellious States, the Supreme Court of the United States say:

War has been well defined to be "that state in which a nation prosecutes its rights by force." The parties belligerent in a public war are independent nations. But it

is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other. (*The Prize Cases*, 2 Black., 666.)

A sovereignty engaged in suppressing an insurrection against its authority may exercise the rights of a belligerent and deal with the insurrectionists as entitled to the protection of the laws of war without authorizing neutrals to deal with them as an independent power. In order that this discussion may not be unduly extended, this point is not elaborated, but is treated as closed by the quotation from the Instructions for the Government of Armies of the United States in the Field, as follows (sec. 10):

1. Insurrection is the rising of people in arms against their government or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

2. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

3. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

4. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

5. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people or of the government which they may have erected as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

6. Treating in the field the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty. (See also *Hickman v. Jones*, 9 Wall., 197, 200; *Williams v. Bruffy*, 96 U. S., 176, 191.)

For the purposes of this investigation it is unnecessary to ascertain the date of the inception of the conspiracy which culminated in the insurrection. The date of the first overt act of the war is not so unimportant. The first hostile engagement between the insurgents and the

forces of the United States consisted of an assault by the insurgents on an outpost located near the town of Santol, a suburb of Manila. The official report of this attack, made by Lieutenant Whedon, the officer in command at said outpost, is as follows (Report of Major-General Commanding Army, 1899, part 2, p. 464):

WATERWORKS DEPOSITO, *February 10, 1899.*

ADJUTANT, *First Nebraska, United States Volunteer Infantry.*

SIR: I have the honor to make the following report of what occurred at Nebraska outpost No. 2 on the evening of February 4, 1899:

On Saturday evening, February 4, 1899, at 7 o'clock, I took charge of outpost No. 2, as ordered. From this outpost, about 100 yards down the road which passes it, is the town of Santol. Here we had a Cossock post of eight men stationed at the junction of three roads, one leading from outpost No. 2, another leading to blockhouse No. 7, the third to blockhouse No. 6. At 7.30 I instructed all the men of this post in their orders, a copy of which is hereto attached. They were to allow no armed insurgents to enter the town or the vicinity. They were to halt all armed persons who attempted to advance from the direction of the insurgents' lines, which lay between blockhouses 6 and 7 and the San Juan bridge, and order them back to their lines. If they refused to go, to arrest them if possible, or if this was impossible, to fire upon them. I also ordered them to patrol each of the roads leading to blockhouses 6 and 7 for 100 yards every half hour. Shortly before 8 o'clock a patrol of three men advanced from Santol toward blockhouse 7. After proceeding about 100 yards they halted at the side of the road and waited to see if there were any insurgents in the vicinity. Private William Grayson, Company D, was a short distance in advance of the other two. After waiting about five minutes, Private Grayson saw four armed men suddenly appear five yards in advance of him. He immediately called "Halt!" as did also Private Miller, Company D, who was in rear of him and saw the men at the same time. At this command the four men cocked their pieces, whereupon Private Grayson called "Halt!" again, and fired at them. Our three men then retreated to the town of Santol, where I met them, being at the town when the shot was fired.

Immediately after the shot was fired we could hear the insurgents coming down the road from blockhouse 7. I sent a man back to the outpost to signal the Nebraska camp that the insurgents were coming from the blockhouse. I remained with the man in Santol and in about three minutes from the time our man fired the shot several armed men emerged from the trees in our front across the road and the houses on our right and fired toward us where we were kneeling in the opposite side of the road. We returned their fire with a volley and then fell back along the road to the pipe line which lies near outpost No. 2, the enemy keeping up a rapid fire along the road for about five minutes. We fired no more after leaving Santol until later in the evening.

About ten minutes after the skirmish at Santol the insurgents opened up a general fire on the Nebraska camp and outposts, and also on Colorado's outpost on our left.

On the morning of February 4 the insurgents ordered our men to move out of town (Santol), and upon their refusal to do so the former said that they would bring a body of men and drive them back when night came.

Very respectfully, your obedient servant,

BURT D. WHEDON,

*Second Lieutenant Company C, First Nebraska United States Volunteer Infantry.*

On February 6, 1899, two days after this engagement occurred, and with full knowledge thereof, the Senate advised the President to ratify the treaty. On the same day (February 6) another engagement between

the insurgents and the troops of the United States occurred. The official report on that engagement is as follows:

FIRST NEBRASKA UNITED STATES VOLUNTEER INFANTRY,  
OFFICE OF THE COMMANDING OFFICER,  
*Waterworks, Deposito, February 7, 1899.*

ADJUTANT-GENERAL,

*Second Brigade, Second Division, Eighth Army Corps.*

SIR: I have the honor to report that early Monday morning, February 6, 1899, I sent the telegram appended, marked "A," to brigade and division headquarters. Having had no reply, I again urged the importance of the movement. I was then instructed by General MacArthur, who was then on the extreme left of the line, to forward my communications to the department commander direct, a copy of which is inclosed and marked "B." In reply to this I received a note from Colonel Barry, stating that he would be out with two battalions, and that we would then proceed to the waterworks.

As nothing seems to be done, and it was impossible to get into communication with higher authority, and the insurgents were intrenching and massing in our front, I ordered the troops prepared for an immediate advance, hoping to have every preparation made before the enemy could get into position. A copy of this order is inclosed, marked "C." At about 1 o'clock I received a message from Colonel Barry, saying that he would not be out, and about the same time the enemy's sharpshooters began firing upon us. Here I ordered the Utah battery to open fire on intrenched position north of road and about three-fourths of a mile from the Deposito. The action then began to be general all along our entire front, and the infantry fire was terrific on our left near the Mariquina-Manila road. We charged on them and took hill after hill all the way to pumping station. About three-fourths of a mile from the Deposito a horse with a broken leg was found, which proved to have been the one ridden by Dr. H. A. Young, of the Utah Battery. His body was found horribly mutilated a mile farther on the road.

On our left, about 2 miles from the Deposito, Company L, Captain Taylor, made a very gallant charge on a stone intrenchment and could not take the position at first. I thought the Twenty-third Infantry was up, but as Company L seemed to be falling back I ordered over three companies, B, G, and H, of this regiment to reenforce the line. They all charged a quarry, our troops losing 1 man killed and 4 wounded. The enemy broke, and as they retreated out of the cover into the open they were severely handled, 17 being killed. After that they were shelled and flanked out of every position and kept on the run. The line of their retreat was the direction of Mariquina. At 4.45 we arrived at the pumping station and found the machinery intact except the cylinder and valves, which had been hidden under the coal.

Companies D and I of the First Colorado, under Major Grove, did valuable service on the right during the advance.

The Tennessee battalion, under Major Cheatham, formed our right flank and was slightly refused.

As usual the Utah Battery (A) did most excellent service.

The battalion of the Twenty-third Infantry on our left followed the general direction of the Mariquina-Manila road and protected our left flank. I inclose copy of the order I sent Major Goodale, who received it near the powder magazine.

We threw outposts to the front, left, and right, and put one company at the pumping station.

Very respectfully,

JOHN M. STOTSENBERG,  
*Colonel, First Nebraska United States Volunteer Infantry.*

It was soon evident that the insurrection was general throughout the greater portion of the archipelago. On March 2, 1899, in view

of this insurrection, Congress authorized the President to increase the Regular Army from 27,500 men to 65,000 and to raise and equip 35,000 volunteers. And again—

In view of the provisions of the act of March 2, 1899, requiring the muster out of the volunteers not later than July 1, 1901, and of the utter inadequacy of the Regular Army after that date to meet existing conditions, Congress, by the act of February 2, 1901, authorized its increase to 100,000 men. (Rept. Adj. Gen. U. S. A., 1901, 8.)

In this act Congress twice directly refers to the conditions existing in the Philippines, as follows:

SEC. 36. That when in his opinion the conditions in the Philippine Islands justify such action, the President is authorized to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organization shall not exceed twelve thousand, and the total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time one hundred thousand.

\* \* \* \* \*

SEC. 41. That the distinctive badges adopted by military societies of men "who served in the armies and navies of the United States during the Spanish-American war and the *incident insurrection in the Philippines*" may be worn upon all occasions of ceremony by officers and men of the Army and Navy of the United States who are members of said organizations in their own right.

It is unnecessary to recite in detail the many actual encounters between the forces of the insurrection and the troops of the United States, by which this insurrection has been continued, nor the military operations which have been carried on for its suppression. It is sufficient to call attention to the fact that the United States has been called upon to raise, equip, and transport to said archipelago two armies and that the military forces engaged in meeting the exigencies of the military situation therein range in number from 60,420 men and officers in December, 1900, to 47,949 on August 31, 1901.

Congress has been informed constantly as to the existence of said insurrection and the military measures undertaken to suppress it, and has voted men and means for conducting the military operations, whenever necessary. Were further sanction required it is to be found in the expression of approval registered by the sovereign people at the Presidential election in 1900.

That a war so inaugurated, continued, and sanctioned authorizes the exercise of the rights of a belligerent by the United States authorities engaged in its prosecution admits of no question.

Since the authority of the United States to exercise the rights of a belligerent arises from the acts and operations of the persons engaged in the insurrection in the Philippines and the efforts to overthrow the

government instituted in the islands by the United States, it follows that such authority is no more affected by the treaty of peace with Spain than it is by the treaty of peace with Mexico.

So long as the United States is authorized to exercise the rights of a belligerent there are no limitations on such exercise excepting those imposed by the laws and usages of war.

It will be seen that the question involved is not Are the Philippine Islands *foreign* territory? but Are the Philippine Islands *hostile* territory? The determination of this question belongs to the political branch of this Government and is to be made by the Executive, in the absence of Congressional action. It is one of those powers in the exercise of which the Executive binds the courts, and with reference thereto the United States Supreme Court say:

And in this view it is not material to inquire, nor is it the province of the court to determine, whether the Executive is right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and Government of the Union.

If this were not the rule, cases might arise in which on the most important questions of foreign jurisdiction there would be an irreconcilable difference between the executive and judicial departments. By one of these departments a foreign island or country might be considered as at peace with the United States, whilst the other would consider it in a state of war. No well-regulated government ever sanctioned a principle so unwise and so destructive of national character. (*Williams v. Suffolk Ins. Co.*, 13 Pet., 415.)

In the Prize Cases (2 Black, 635, 670) the court say:

Whether the President, in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided *by him*, and this court must be governed by the decisions and acts of the political department of the Government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case.

By reason of the victory of the fleet under Dewey's command in Manila Bay, and the subsequent capture of the city of Manila by the military forces of the United States, the town and port became subject to military occupation by the forces of the United States. Under the laws and usages of war the military occupation of territory creates an obligation to provide for the administration of the affairs of civil government in the occupied territory. This obligation is binding upon the military authorities of the United States, and the resulting duty may be discharged by them. (*Cross et al. v. Harrison*, 16 How., 164, 193; *Leitensdorfer v. Webb*, 20 How., 176, 177.)

Governments so created are intended to perform two services—promote the military operations of the occupying army and preserve the safety of society. (*Ex Parte Milligan*, 4 Wall., 127.)

For the accomplishment of these purposes such a government, to use the language of the United States Supreme Court—

may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exercised in such cases save those which are found in the laws and usages of war. \* \* \* In such cases the laws of war take the place of the Constitution and the laws of the United States as applied in time of peace. (*New Orleans v. Steamship Co.*, 20 Wall., 394.)

Among the powers properly exercised by a military government is the right to secure revenues for its own maintenance. President McKinley, in his communication to the Secretary of War dated July 13, 1898, written with reference to the government of civil affairs in Cuba under military occupation, said:

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues.

\* \* \* \* \*

While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government becomes payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police and for the payment of the expenses of the army. (See G. O. No. 101, A. G. O., series 1898.)

In *New Orleans v. Steamship Co.* (20 Wall., 394) the court say:

The conquering power has a right to displace the preexisting authority and to assume to such an extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. *It may prescribe the revenues to be paid and apply them to its own use or otherwise.*

The military government of the Philippines adopted the plan of imposing custom duties on imports into and certain exports from said islands. The order so to do was issued on July 12, 1898, by William McKinley as Commander in Chief of the Army and Navy of the United States of America, as follows:

EXECUTIVE MANSION, *July 12, 1898.*

By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that, upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States, the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.

Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.

Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.

Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

WILLIAM MCKINLEY.

The tariff of duties and taxes established by said order contains the following provisions regarding exports:

PAR. 4. \* \* \* No prohibited or contraband goods shall be exported.

## II. EXPORT DUES.

On the products of the Philippine Islands when exported therefrom there shall be levied and collected an export tax as follows:

	Pesos.
297. Abaca, raw or wrought hemp .....	100 kilos gross.. 0.75
298. Indigo.....	do..... .50
299. Indigo, employed for dyeing ("tintarron").....	do..... .05
300. Rice.....	do..... 2.00
301. Sugar.....	do..... .10
302. Cocoanuts, fresh and dried (copra).....	do..... .10
303. Tobacco, manufactured, of all kinds and of whatever origin .....	do..... 3.00
304. Tobacco, raw, grown in the provinces of Cagayan, Isabela, and New Biscaya (Luzon islands) .....	100 kilos gross.. 3.00
305. Tobacco, raw, grown in the Visayas and Mindanao islands.....	do..... 2.00
306. Tobacco, raw, grown in other provinces of the archipelago.....	do..... 1.50

(See Customs Tariff and Regulations for the Philippine Islands, July 13, 1898.)

Subsequent provisions respecting export duties were made as follows:

372. Export duties paid in Cuba, Porto Rico, or the Philippine Islands will be refunded on the return of the merchandise to those islands without having been advanced in value or changed in condition by any process of manufacture while abroad.

\* \* \* \* \*

374. Merchandise imported into the Philippine Islands upon which duty has not been paid may be reexported without payment of duty upon payment of wharfage, harbor dues, 2 per cent ad valorem, and storage, if any. The reexporter shall at the time of reexportation deliver to the collector of customs such guaranty as the collector may require, agreeing to pay the full duties on the goods reexported, or deliver to the said collector within a reasonable time, to be fixed by the collector, a certificate showing that the goods have been landed at the port to which they were reexported, which certificate shall be signed by the consignees, master of the vessel in which the goods are reexported, and the chief revenue officer at the port of final destination. (See Customs Tariff and Regulations for the Philippine Islands, containing the amended tariff provisions to September 1, 1899, issued by the office of the United States military governor in the Philippine Islands under date October 23, 1899.)

There can be no doubt of the authority of the President, as Commander in Chief of the Army and Navy, to enforce the provisions above quoted at the time the order was issued, July 12, 1898. (Dooley v. United States, 182 U. S.; Cross v. Harrison, 16 How., 182; New Orleans v. Steamship Co., 20 Wall., 387; Thirty Hogsheads of Sugar, 9 Cranch, 991; Fleming v. Page, 9 How., 603; Am. Ins. Co. v. Canter, 1 Pet., 511.)

When New Mexico was conquered by the United States, the executive authority of the United States properly established a provisional



government, which ordained laws and instituted a judicial system; all of which continued in force after the termination of the war, and until modified by the direct legislation of Congress, or by the Territorial government established by authority of Congress.

In *Leitensdorfer v. Webb* (20 How., 178) the Supreme Court of the United States say:

Accordingly we find that there was ordained by the provisional government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned. By the same authority the jurisdiction of the circuit courts to be held in the several counties was declared to embrace, first, all criminal cases that shall not be otherwise provided by law; and, second, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. (*Vide Laws of New Mexico, Kearney's Code, p. 48.*) Of the validity of these ordinances of the provisional government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended that whatever may have been the rights of the occupying conqueror as such, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and reestablished. The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. *We conclude, therefore, that the ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress or by that of the Territorial government in the exercise of powers delegated by Congress.*

The particular one of the "ordinances and institutions of the provisional government" of the Philippines now under consideration has not been "revoked or modified by the United States, either by direct legislation on the part of Congress or by that of the Territorial government in the exercise of powers delegated by Congress."

In *Hamilton v. Dillin* (21 Wall., 87-88) the United States Supreme Court say:

In *Cross v. Harrison* (16 How., 190) it was held that the President, as Commander in Chief, had power to form a temporary civil government for California as a conquered country, and to impose duties on imports and tonnage for the support of the Government, and for aiding to sustain the burdens of the war, *which were held valid until Congress saw fit to supersede them*; and an action brought to recover back duties paid under such regulation was adjudged to be not maintainable.

But these trade regulations do not depend upon Congressional inaction for force and effect. So long as the insurrection continues the President, as Commander in Chief of the military forces of the United States, will continue to have the authority to regulate and control trade with the hostile territory by the exercise of belligerent

right, and may prohibit all trade therewith or permit it on such terms and conditions as he sees fit to impose. The question of the right of this nation, by the exercise of its war powers, to regulate trade with territory affected by insurrection arose during the civil war. It will be recalled that President Lincoln, by proclamation dated April 19, 1861 (12 Stat. L., 1258), declared the ports of the rebellious States blockaded, and that said action was taken by virtue of his right to exercise the war powers of the nation, as the occasion should require, without the previous assent of Congress. Subsequently Congress, in the exercise of the war powers of the nation, passed a number of acts regulating and prohibiting trade with the rebellious States.

By the act of July 13, 1861 (12 Stat. L., 255-258), the President was authorized, after certain preliminary measures for suppressing the insurrection, to declare by proclamation what States and what parts of States were in a state of insurrection against the United States; "and thereupon," the act proceeds to say, "all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, etc., coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle, etc., be forfeited to the United States: *Provided, however*, That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury." (Sec. 5, p. 257.)

In pursuance of this act the President, on the 16th of August, 1861, issued a proclamation (12 Stat. L., 1262) declaring that the inhabitants of certain States were in a state of insurrection against the United States, and that all commercial intercourse between them and the citizens of other States was unlawful, and that all goods, etc., coming from said States without the special license and permission of the President, acting through the Secretary of the Treasury, or proceeding to any of said States, etc., would be forfeited, etc. This proclamation excepted from its operation, among other things, such parts of the enumerated States as might maintain a loyal adhesion to the Union and Constitution or might be from time to time occupied and controlled by forces of the United States. A subsequent proclamation, issued April 2, 1863 (13 Stat. L., 730-731), abrogated the said exception as embarrassing "to the due enforcement of said act of July 13, 1861, and the proper regulation of the commercial intercourse authorized by said act;" such abrogation, however, not extending to West Virginia or the ports of New Orleans, Key West, Port Royal, or Beaufort in South Carolina.

I submit herewith copy of section 5. act of July 13, 1861, and of the two proclamations issued by President Lincoln pursuant thereto. Also sections 5 and 6 of the act of July 2, 1864. (See Appendix A.)

The laws above referred to are two of the enactments popularly known as the "nonintercourse acts." These acts are of continuing force and constitute sections 5300-5322, Revised Statutes of the United States, title "Insurrection." Said acts do nothing more than to declare the rule established by the laws and usages of war, and relate exclusively to insurrections in a State or several States of the Union. They clearly evidence that the legislative branch of this Government recognizes the authority to regulate commercial intercourse with insurgent territory by exercise of belligerent rights. Argument is unnecessary to establish that a national authority, based upon the laws of nations, which the United States may exercise over inhabitants of a State of the Union, may also be exercised over the inhabitants of any territory subject to its sovereignty.

The question of the right of the Federal authorities to thus exercise the war powers of the nation in the matter of trade with the rebellious States was presented to the Supreme Court of the United States in many forms and by many cases. In each instance the court held that business intercourse between the citizens of States at war is unlawful without express declaration of the sovereign, the existence of the condition of war being sufficient to create the inability to lawfully engage in trade with public enemies. (*United States v. Grossmayer*, 9 Wall., 72; *Hanger v. Abbott*, 6 Wall., 532; *McKee v. United States*, 8 Wall., 163; *Mitchell v. United States*, 21 Wall., 350; *Jecker v. Montgomery*, 18 How., 110; *The Prize Cases*, 2 Black., 635; *Hamilton v. Dillin*, 21 Wall., 73; *The Reform*, 3 Wall., 617; *The Sea Lion*, 5 Wall., 630; *The Ouachita Cotton*, 6 Wall., 521; *Coppel v. Hall*, 7 Wall., 542; *Mrs. Alexander's Cotton*, 2 Wall., 404.)

In *Matthews v. McStea* (91 U. S., 9) the court say:

It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war, and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted. The reasons for this rule are obvious. They are that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent; and, were commercial intercourse allowed, it would tend to strengthen the enemy and afford facilities for conveying intelligence and even for traitorous correspondence. Hence it has become an established doctrine that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and "places every individual of the respective governments, as well as the governments themselves, in a state of hostility;" and it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war, for their continued existence would involve community of interest and mutual dealing between enemies.

Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of foreign war. Certainly this is so when civil war is sectional. Equally with foreign war it renders commercial intercourse unlawful between the contending parties, and it dissolves commercial partnerships.

The situation in the Philippines is as follows:

The insurrection creates the condition of war; that condition prevailing, trade with the hostile territory is unlawful. To ameliorate this condition the commander in chief authorizes trade with certain parts in territory from which the insurgents are excluded by the military forces of the United States, but imposes customs duties on certain commodities as a condition on the privilege. This view is amply sustained by the decision of the United States Supreme Court in *Hamilton v. Dillin*. (21 Wall., 73.) That case arose as follows: During the progress of the civil war President Lincoln, pursuant to the provisions of the act of Congress above referred to (sec. 5, 12 Stat. L., 257), providing that trade with the rebellious territory should be carried on "only in pursuance of rules and regulations prescribed by the Secretary of the Treasury," adopted and enforced a rule permitting the purchase of cotton in any insurrectionary district and to transport the same to a loyal State upon the payment to the Government of 4 cents for each pound purchased.

From August, 1863, to July, 1864, Hamilton secured permits to purchase and ship to loyal States large quantities of cotton, amounting to over 7,000,000 pounds, and paid thereon at the rate of 4 cents a pound. The cotton was purchased at Nashville, Tenn., during the time that city and district were within the lines of the Federal forces and at a time when the United States exercised full administrative and legislative authority over said town and the State of Tennessee. It will be recalled that at the period indicated, Andrew Johnson was acting as governor of Tennessee under appointment by President Lincoln. Hamilton brought suit against Dillin, surveyor of the port at Nashville, Tenn., to recover the amount paid on said permits, contending that the President had no authority to require its payment, since Congress alone had the right to lay taxes, duties, imposts, and excises, and that the rule enforced against him became null and void when Nashville passed into the possession of the Union forces and became subject to the sovereignty of the United States. The United States Supreme Court denied his right to recovery. The court held (*syllabi*, *Hamilton v. Dillin*, 21 Wall., 73, 74):

The Government of the United States clearly has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit. This power is incident to the power to declare war and to carry it on to a successful termination.

It seems that the President alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power; but whether so or not there is no doubt that with the concurrent authority of the Congress he may exercise it according to his discretion.

The charge of 4 cents per pound required by these regulations was not a tax, nor was it imposed in the exercise of the taxing power, but in the exercise of the war power of the Government. It was a condition which the Government and the Presi-

dent, endowed with the powers thereof, in the exercise of supreme and absolute control over the subject, had a perfect right to impose.

The condition thus imposed was entirely in the option of any person to accept or not. If any did accept it and engage in the trade, it was a voluntary act, and all payments made in consequence were voluntary payments, and on that ground alone (if there were no other) could not be recovered back.

Nashville, though within the national military lines in 1863 and 1864, was nevertheless hostile territory, within the prohibition of commercial intercourse, being within the terms of the President's proclamation on that subject, which proclamation in that regard was not inconsistent with the act of July 13, 1861, properly construed.

The civil war affected the status of the entire territory of the States declared to be in insurrection except as modified by declaratory acts of Congress or proclamation of the President.

In the body of the opinion the court say:

There can be no question that the condition requiring the payment of 4 cents per pound for a permit to purchase cotton in and transport it from the insurrectionary States during the late civil war was competent to the war power of the United States Government to impose. The war was a public one. The Government in prosecuting it had at least all the rights which any belligerent power has when prosecuting a public war. That war was itself a suspension of commercial intercourse between the opposing sections of the country. No cotton or other merchandise could be lawfully purchased in the insurrectionary States and transported to the loyal States without the consent of the Government. If such a course of dealing were permitted at all, it would necessarily be upon such conditions as the Government chose to prescribe. The war power vested in the Government implied all this without any specific mention of it in the Constitution.

\* \* \* \* \*

By the Constitution of the United States the power to declare war is confided to Congress. The executive power and the command of the military and naval forces is vested in the President. Whether in the absence of Congressional action the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject.

\* \* \* \* \*

The Government chose to impose this condition. It supposed it had a right to do so. No one was bound to accept it. No one was compelled to engage in the trade. Not the least compulsion was exercised. The plaintiffs endeavor to put the case as if they were obliged to pay this exaction to save their property. This is not a true view of it. It is admitted that the property was purchased under the license. If so, it was also purchased in view of the regulations to which the license referred. The regulations themselves show that the permit to purchase and the permit to export were correlative to each other; that no one was permitted to purchase who did not enter into bond to pay all fees required by the regulations, amongst which the charge of 4 cents per pound on cotton was expressly inserted. In short, the permit to purchase and export constituted substantially one permit, and that was granted only on the condition of paying the prescribed fees, as before stated. \* \* \* The case does not come within any class of cases on which the plaintiffs rely to take it out of the rule as to voluntary payments. In our judgment, therefore, the defense in this case might have rested on this ground alone.

\* \* \* \* \*

The position that Nashville, being within the national lines, was not hostile territory in 1863 and 1864, and, therefore, not within the prohibition of commercial intercourse contained in the act of 1861, is not tenable. The State of Tennessee was named in the President's proclamation as one of the States in insurrection; and, as we have seen, the exceptions made in his first proclamation in favor of maintaining commercial intercourse with parts of such States remaining loyal or occupied by the forces of the United States were abrogated by the proclamation of April 2, 1863, except as to West Virginia and certain specified ports. There was nothing in this action of the President repugnant to, or not in conformity with, the act of 1861. "This revocation," as remarked by the court in the case of *The Venice* (2 Wall., 278), "merely brought all parts of the insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861." The act gave the President power, where a State or part of a State remained irreclaimable, to declare that the inhabitants of such State, or any section or part thereof where such insurrection existed, were in a state of insurrection. This power clearly gave the President a discretion to declare an entire State, where the insurrection was persisted in, or only a hostile district therein, in a state of insurrection. Finding the attempt to discriminate between the different parts of a State (except in peculiar cases) impracticable, he abandoned the attempt, and declared the entire State in a state of insurrection. He clearly had the authority so to do, more especially as the insurrection was supported by State organizations and the actual State authorities. Thenceforth the war became a well-defined territorial war, and was in great measure conducted as such. The further provision of the act, that all commercial intercourse with the insurrectionary districts should cease "so long as such condition of hostility shall continue," could not be construed as allowing such intercourse to be resumed by individuals at will, as fast and as far as our armies succeeded in occupying insurgent territory. The "condition of hostility" remained impressed upon the insurrectionary districts until it was authoritatively removed by the proclamation of the President at the close of the war. \* \* \*

But it is unnecessary to pursue this subject. We have frequently held that the civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President; and nothing but the apparent earnestness with which the point has been urged would have led to a further discussion of the point.

\* \* \* \* \*

It is hardly necessary, under the view we have taken of the character of the regulations in question, and of the charge or bonus objected to by the plaintiffs, to discuss the question of the constitutionality of the act of July 13, 1861, regarded as authorizing such regulations. As before stated, the power of the Government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit is undoubted. It is a power which every other government in the world claims and exercises, and which belongs to the Government of the United States as incident to the power to declare war and to carry it on to a successful termination. We regard the regulations in question as nothing more than the exercise of this power. It does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government, just as much so as the power to levy military contributions, or to perform any other belligerent act.

In *Ketchum v. Buckley* (99 U. S., 188, 190) the court say:

It is now settled law in this court that during the late civil war "the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards."

Notwithstanding the fact of this jurisdiction, the court say in *New Orleans v. Steamship Co.* (20 Wall., 387):

Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that Government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war.

### III. THE RIGHT TO REGULATE TRADE WITH TERRITORY SUBJECT TO MILITARY OCCUPATION.

The Instructions for the Government of Armies of the United States in the Field provide as follows (sec. 5, par. 1):

All intercourse between territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the Government or by the highest military authority. Contraventions of this rule are highly punishable.

In *Fleming v. Page* (9 How., 615) the court say:

It is true that when Tampico had been subjugated other nations were bound to regard the country, while our possession continued, as the territory of the United States and to respect it as such. \* \* \* The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them.

The rule laid down by Chancellor Kent is as follows:

The law has put the sting of disability into every kind of voluntary communication and contact with an enemy which is made without the special permission of the government. There is wisdom and policy, patriotism and safety, in this principle, and every relaxation of it tends to corrupt the allegiance of the subject and to prolong the calamities of war. (16 Johnson, 459, 460; *United States v. Grossmayer*, 9 Wall., 72.)

It matters not whether property be bought or sold, or merely transported and shipped, the contamination of forfeiture is consummated the moment it becomes the object of illegal intercourse. (*The Rapid*, 8 Cranch., 155; *The Sally*, 8 Cranch., 382; *Wharton's Conflict of Laws*, sec. 497.)

Birkhimer, in his work on *Military Government and Martial Law*, says (p. 204):

One of the most important incidents of military government is the regulation of trade with subjugated districts. The occupying state has an unquestioned right to regulate commercial intercourse with the conquered territory. It may be absolutely prohibited, or permitted to be unrestricted, or such limitations may be imposed thereon as either policy or a proper attention to military measures may justify. While the victor maintains the exclusive possession of the territory his title is valid. Therefore the citizens of no other nation have a right to enter it without the permission of the dominant power. Much less can they claim an unrestricted right to trade there. (See also *Bluntschli I*, sec. 8; *Manning*, p. 167; *Fleming v. Page*, 9 How., 603, 615.)

Birkhimer further says (p. 230):

It is not the practice of military commanders to deal gently with those who, while accepting the benefits of the Government which in amelioration of the strict rules of war has been established over them, seek to impair its power or adhere to the enemy by giving him aid and comfort. In this respect there is no difference in the situation of persons inhabiting territory militarily occupied. Whether subjects of the vanquished state or of a neutral power, their obligations are equally strong to do nothing to prejudice the interests of the government which the conqueror establishes over

them, and as to all persons who did not reside or were not found in the territory when it was occupied, whatever may be their nationality, the conqueror alone determines upon what terms, if at all, they shall be permitted to either enter the occupied district or to hold communication or business relations with the inhabitants thereof. Either to admit them or to permit intercourse is a relaxation of the strict rules of war. (See also *Hanger v. Abbott*, 6 Wall., 535.)

In *Dooley v. United States* (182 U. S., p. 222) Mr. Justice Brown, delivering the opinion of the court, says:

Upon the occupation of the country by the military forces of the United States the authority of the Spanish Government was superseded, but the necessity for a revenue did not cease. The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting this method General Miles was fully justified by the laws of war. The doctrine upon this subject is thus summed up by Halleck in his work on International Law (vol. 2, p. 444): "The right of one belligerent to occupy and govern the territory of the enemy while in its military possession is one of the incidents of war and flows directly from the right to conquer. We therefore do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war, as established by the usage of the world and confirmed by the writings of publicists and decisions of courts—in fine, from the law of nations. \* \* \* The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. \* \* \* He nevertheless has all the powers of a *de facto* government, and can at his pleasure either change the existing laws or make new ones."

In *New Orleans v. Steamship Co.* (20 Wall., 387, 393), it was said, with respect to the powers of the military government over the city of New Orleans after its conquest, that it had "the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has the right to displace the preexisting authority, and to assume to such an extent as it may deem proper, the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject." (See also *Thirty Hogsheads of Sugar*, 9 Cr., 991; *Fleming v. Page*, 9 How., 603; *American Ins. Co. v. Canter*, 1 Pet., 511.)

But it is useless to multiply citations upon this point, since the authority to exact similar duties was fully considered and affirmed by this court in *Cross v. Harrison* (16 How., 182). This case involved the validity of duties exacted by the military commander of California upon imports from foreign countries from the date of the treaty of peace, February 3, 1848, to November 13, 1849, when the collector of customs appointed by the President entered upon the duties of his office. Prior to the treaty of peace and from August, 1847, duties had been exacted by the military authorities, the validity of which does not seem to have been questioned. Page 189: "That war tariff, however, was abandoned as soon as the military governor had



received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into other ports of the United States, Upper California having been ceded by the treaty to the United States. The duties were held to have been legally exacted." Speaking of the duties exacted before the treaty of peace, Mr. Justice Wayne observed (p. 190): "No one can doubt that these orders of the President, and the action of our army and navy commanders in California in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations." It was further held that the right to collect these duties continued from the date of the treaty up to the time when official notice of its ratification and exchange was received in California. Owing to the fact that no telegraphic communication existed at that time, the news of the ratification of this treaty did not reach California until August 7, 1848, during which time the war tariff was continued. The question does not arise in this case, as the ratifications of the treaty appear to have been known as soon as they were exchanged.

The court further held in *Cross v. Harrison* that the right of the military commander to exact the duties prescribed by the tariff laws of the United States continued until a collector of customs had been appointed. Said the court: "The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. \* \* \* We think it was continued over a ceded conquest without any violation of the Constitution or laws of the United States, and that, until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

It would therefore seem—

1. That in territory rendered hostile by the existence of an insurrection against its authority, the United States may exercise the war powers of the nation, known to international law and the laws and usages of war as belligerent rights.

2. That the payment of customs duties, if considered as taxes levied by a government resulting from military occupation of hostile territory; or as military contributions required from hostile territory; or as a condition imposed upon the right of trade with hostile territory, are each and all legitimate and lawful requirements imposed by exercise of belligerent right.

3. The military occupier of districts in hostile or enemies' territory is authorized to regulate trade in the districts subject to his occupation, as his discretion, with reference to the military situation, shall determine.

4. That the President is authorized to exercise the authority to regulate trade with hostile territory in the absence of Congressional provision in regard thereto.

Attention is called to the fact that so long as the Philippine Islands are governed by the war powers of the nation, many international questions are avoided—such, for instance, as the effect of the transfer of sovereignty upon the prior treaties between Spain, Germany, and England respecting trade and other privileges in the Joló and other islands; the exclusion of Chinese persons, subjects of China, Great Britain, and other nations; the regulation of coastwise and other shipping; the navigation of the maritime waters of the archipelago; the damage or destruction by the insurgents of property owned by subjects of neutral nations; the many delicate and intricate questions involved in what is designated “the open door in the Philippines,” etc.

Questions of the character above indicated have been presented to the United States by the Governments of Spain, Germany, Great Britain, France, Switzerland, and China, and also by many citizens of the United States. At present the United States is able to justify its conduct of affairs in the Philippines by reference to the established, well-recognized laws of nations respecting territory governed by the war powers of a nation, and such justification is accepted and acceptable to the other nations interested or involved. If, however, such action should be taken as would indicate or establish that the United States in governing the Philippines had abandoned reliance upon the laws and usages of nations respecting hostile territory subject to military occupation, these international controversies would become acute and the situation in the Philippines further complicated, to the possible embarrassment of the United States.

#### IV. HAS THE POLITICAL BRANCH OF THE UNITED STATES GOVERNMENT TAKEN SUCH ACTION REGARDING THE PHILIPPINES AS EVIDENCES A RECOGNITION OF THE TERRITORY OF THE ISLANDS AS PEACEABLE INSTEAD OF HOSTILE?

In considering this question it must be remembered that the territory became hostile by reason of the conduct of the inhabitants engaged in the insurrection. While the insurrection continues to be waged by armed forces or bodies of insurgents, the territory will remain hostile, in fact, regardless of the actions or desires of the executive department or the political branch of this Government. At present the military situation in the Philippines requires the maintenance therein by the United States of an army of 1,711 officers and 46,232 enlisted men, and also a naval squadron of the national ships, all of which are actively engaged in maintaining the authority of the United States in said archipelago. From time to time, as the insurgent forces were scattered or driven out of portions of the islands, the territory was occupied by the troops of the United States, and thereupon the affairs of civil government in the territory subject to military occupation were administered by the military authorities. This administration was attempted

pursuant to the obligations of international law requiring the successful invader to provide a substitute for the civil government which has been overthrown. (Brussels Project of an International Declaration concerning Laws and Customs of War, sec. 2; Instructions for the Government of Armies of the United States in the Field, sec. 1, Cl. 1-7.)

Pomeroy says:

Military government is the authority by which a commander governs a conquered district when the local institutions have been overthrown and the local rulers displaced, and before Congress has had an opportunity to act under its power to dispose of captures or to govern territories. This authority in fact belongs to the President, and it assumes the war to be still raging and the final status of the conquered province to be determined, so that the apparent exercise of civil functions *is really a measure of hostility*. (Pomeroy's Constitutional Law, Bennett's 3d ed., par. 712, p. 595.)

In order further to weaken the insurrection and promote the cause for which the armies of the United States were fighting in the Philippines, President McKinley attempted, as occasions permitted, to arrange for the administration of the affairs of civil government in portions of the islands by civilians instead of the military authorities, and to inaugurate, if possible, local governments essentially popular. This was plainly a war measure, and in adopting it President McKinley followed the example set by President Lincoln during the civil war.

The first effort in this direction was the order of January 20, 1899, appointing the first Philippine Commission. Military necessities resulting from the insurrection prevented the accomplishment of the purposes of this Commission, and for a time the plan was held in abeyance.

In March, 1900, it was considered that the success of our Army over the forces of the insurrection enabled our troops to hold and control territory sufficient to justify the further attempt to carry out the original intention to transfer the administration of the affairs of civil government to civilians.

On March 15, 1900, the President issued an order contemplating "the return of the Commission, or such of the members thereof as can be secured, to aid the existing authorities and facilitate this work throughout the islands." (Message to Congress, December 5, 1899.)

The authority conferred upon the Commission, and the general subjects respecting which the authority was to be exercised, were set forth in a communication from the President to the Secretary of War, dated April 7, 1900, containing certain instructions to be communicated by the Secretary of War to the Commission. As stated therein, the Commission was created "to continue and perfect the work of organizing and establishing civil government already commenced by the military authorities."

To promote this general purpose the Commission were instructed

to devote their attention to the establishment of municipal governments in the cities and towns; the organization of government in the larger administrative divisions corresponding to counties, departments, or provinces; and, whenever the Commission is of opinion that the condition of affairs in the islands is such that the central administration may safely be transferred from military to civil control, they are to report that conclusion to the Secretary of War, with their recommendations as to the form of such central government.

On the 1st day of September, 1900, the authority to exercise the powers of government in the Philippines which are of legislative nature, was transferred from the military governor to the Commission, to be thereafter exercised by them under the direction and subject to the approval of the President, through the Secretary of War, until the establishment of the civil central government of the islands or until Congress shall otherwise direct.

The Commission were directed to exercise this legislative authority in the making of rules and orders having the effect of law for the raising of revenue by taxes, customs duties, and imports; the appropriation and expenditure of public funds of the islands; the establishment of an educational system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military governor had been competent theretofore to provide by rules or orders of a legislative character.

Certain but not all of the powers of the Philippine government of an executive nature were conferred upon the Commission. The executive powers conferred consisted of the authority to appoint officers under the judicial, educational, and civil-service systems and in the municipal and departmental governments.

Until July 4, 1901, the military governor continued to be the executive head of the government of the Philippines and to exercise the executive authority not expressly assigned to the Commission, subject to the rules and orders enacted by the Commission in the exercise of their legislative powers.

During this period the municipal and departmental governments continued to report to the military governor and were subject to his administrative supervision and control, under the direction of the Commission.

On June 21, 1901, the President appointed Hon. William H. Taft civil governor of the Philippine Islands, and directed that on and after the 4th day of July, 1901, the executive power of appointment, theretofore exercised by the Commission, should be exercised by said civil governor with the advice and consent of the Commission; that as to the portions of the islands wherein public order is restored and pro-

vincial civil governments are established, the executive powers theretofore exercised therein by the military governor were transferred to the civil governor, and the provincial and municipal governments and officials required to report to the civil governor.

The authority of the military governor was continued as theretofore existing in those districts in which insurrection against the authority of the United States continues to exist or in which public order is not sufficiently restored to enable provincial civil government to be established.

On the 4th day of July, 1901, in the city of Manila, William H. Taft was inaugurated as the first civil governor of the Philippine Islands.

Inasmuch as there are districts on the islands in which insurrection against the authority of the United States continues to exist, or in which public order is not sufficiently restored to enable provincial civil government to be established, it follows that the powers of civil government in said islands continue to be exercised by both military and civilian officials. The military governor is the head of those districts wherein the affairs of civil government are administered by the military. The civil governor is the head of the government in those districts wherein the affairs of civil government are administered by provincial and municipal governments, conducted by civilians.

The territorial subdivisions in which the affairs of civil government are administered by civilians, and those in which said affairs are administered by the military authorities, are shown by the following table: (See Annual Report of the Secretary of War for 1901, Appendix D, p. 156.)

*Philippine Islands—Provinces under civil administration.*

Island.	Number.	Area (approximate).	Number of de- pendent islands.	Approximate population.
		<i>Sq. miles.</i>		
Luzon:				
Provinces .....	20	37,949	274	3,118,280
Municipal .....	1	24		
Mindanao .....	2	19,080	88	212,067
Visayan group .....	9	17,099	284	1,572,490
Total .....	32	74,152	646	4,902,837

*Islands and provinces under military administration.*

Luzon (provinces) .....	6	6,262	57	609,208
Mindanao (provinces) .....	6	27,641	150	283,592
Mindoro (islands) .....		4,108	26	106,200
Pala'uan and islands .....		5,037	135	52,350
Sulu Archipelago .....		1,029	188	22,630
Visayan group (three islands) .....	3	8,884	236	973,418
Unassigned (two groups) .....		740	145	24,838
Total .....	15	53,701	937	2,072,236

It will be observed that the difference between "military" government and "civil" government in the Philippines is that in one the affairs of civil government are administered by American citizens who have entered the military service of the United States, while in the other the affairs of civil government are administered by American citizens selected from some other branch of the public service or from private life.

There is also the further and substantial difference that under the "military" government the President authorizes the military commander, acting as the head of the government, to exercise the powers of the three branches of government—legislative, executive, and judicial—while under the "civil" government the President provides that the powers of these three branches shall be exercised by different officials or bodies, although they continue to be united in the President.

To ameliorate the conditions imposed upon the inhabitants of this hostile territory by the insurrection, the President permitted trade with certain portions thereof, under certain restrictions and subject to certain conditions. The authority exercised and the reasons prompting the exercise are the same as in the instance of an exchange of prisoners with the insurgents or according to captures the privileges of prisoners of war. Not all portions or parts of the archipelago are open to trade. The ports open to foreign trade are Manila, Luzon Island; Iloilo, Panay Island; Zamboanga, Mindanao Island; Joló, Joló Island; Cebú, Cebú Island; Siassi, Siassi Island.

The amount of revenue derived from the privilege of trading through these ports is shown by the following table, prepared by the statistical branch of the division of insular affairs, War Department:

*Customs duties collected in the Philippines on merchandise, from August 22, 1898, to June 30, 1901.*

On imports:

From United States .....	\$1,607,486.00
From Spain .....	1,993,990.00
	<hr/>
	3,601,476.00
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On exports:

To United States .....	305,699.00
To Spain .....	211,745.00
	<hr/>

	517,444.00
On exports to all countries, same period.....	1,723,173.41

As to the total number of points in the islands to be reached by navigation, the only authentic information available in the Insular Division of the War Department is found on pages 157 to 240, Volume III, Report of Philippine Commission for 1900.

From time to time the President informed Congress as to the course pursued in the administration of the affairs of civil government in the Philippines, and Congress acquiesced therein. Finally, by the legislative action known as the "Spooner amendment" to the army appropriation bill, approved March 2, 1901, the Congress ratified and confirmed the action of the President in said matters and assented to the further continuance of the course being pursued. The "Spooner amendment" is as follows:

[Extract from an act making appropriation for the support of the Army for the fiscal year ending June 30, 1902, approved March 2, 1901.]

\* \* \* \* \*

All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion: *Provided*, That all franchises granted under the authority hereof shall contain a reservation of the right to alter, amend, or repeal the same.

Until a permanent government shall have been established in said archipelago full reports shall be made to Congress on or before the first day of each regular session of all legislative acts and proceedings of the temporary government instituted under the provisions hereof; and full reports of the acts and doings of said government, and as to the condition of the archipelago and of its people, shall be made to the President, including all information which may be useful to the Congress in providing for a more permanent government: *Provided*, That no sale or lease or other disposition of the public lands or the timber thereon or the mining rights therein shall be made: *And provided further*, That no franchise shall be granted which is not approved by the President of the United States and is not, in his judgment, clearly necessary for the immediate government of the islands and indispensable for the interest of the people thereof, and which can not, without great public mischief, be postponed until the establishment of permanent civil government; and all such franchises shall terminate one year after the establishment of such permanent civil government.

In enacting this legislation Congress had recourse to the war powers of the nation. During the civil war, Congress frequently exercised the war powers. Reference has already been made to the action of Congress in regulating trade with the territory of rebellious States during that war. Attention is now directed to the action of Congress in the exercise of the war powers of the nation after the war had ceased and official proclamation thereof had been made.

As regards public matters, there were two proclamations made by the President declaring that the war had closed—one, issued April 2,

1866 (14 Stat. L., 811), embracing all the late rebellious States excepting Texas; and the other, issued August 20, 1866 (14 Stat. L., 814), embracing Texas.

The Executive undertook to place the States which had engaged in the rebellion on a footing of equality with the other States of the Union. Congress antagonized this position and passed what are known as the "reconstruction acts" (14 Stat. L., 428; 15 Stat. L., 14). These acts provided for military government possessing sovereign powers to be exercised by martial rule in the several States mentioned. For this purpose said act required:

That said rebel States shall be divided into military districts and made subject to the military authority of the United States. (14 Stat. L., 428.)

The powers given to the district commanders were as follows (sec. 3, chap. 30, 14 Stat L., 428):

SEC. 3. *And be it further enacted*, That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace, and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void.

The reason for such government was declared by the preamble, as follows:

Whereas no legal State governments or adequate protection for life or property exist in the rebel States of [naming them], and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be established.

The Supreme Court refused to interfere with the enforcement of said reconstruction acts or the exercise of the authority conferred thereby. (*State of Mississippi v. Johnson*, 4 Wall., 475; *State of Georgia v. Stanton*, 6 Wall., 50; *Handlin v. Wickliffe*, 12 Wall., 174; *White v. Hart*, 13 Wall., 646.)

The court held that this legislation was political in character and therefore outside of the jurisdiction of the judicial department; that in creating such legislation Congress exercised certain of the sovereign powers of the nation which exist, but are reserved to the people by the Constitution. No one ever claimed that the government created by this legislation was that provided for by the Constitution of the United States for the States of the Union. It found its legal justification in being an exercise of the inherent right of national sovereignty to adequately deal with a national emergency.

The situation then existing is thus described by Birkhimer:

But it was also true that the civil governments in the late insurrectionary States were inimical to the Union; that society there was in a dangerously disordered con-



dition; that deep-seated enmity was at this period entertained by the leading people toward important principles of governmental policy which those who had saved the Union had resolved should be incorporated into the Constitution. (Amendment XIV.) Technically it might be termed "time of peace," but in reality it was far different, as that phrase is generally understood. (Military Government and Martial Law, Ed. I, 388.)

In Texas, the military government installed under the reconstruction acts continued until April 16, 1870. Prior to the passage of the reconstruction acts in 1867, the people of Texas called a constitutional convention, which convened on February 7, 1866, and so amended the constitution of the State as to meet the changed condition of affairs brought about by the result of the war and the fourteenth amendment to the Constitution of the United States. These amendments were ratified by the people. All officers provided for by the State constitution were elected, and entered upon the discharge of their respective duties. The legislature met and passed laws, and the State government was again administered by officers holding under the terms of the State constitution; all the courts were held by judges elected as that constitution prescribed, and county and municipal officers, selected in the same manner, entered upon the discharge of their duties. But the reconstruction act of March 2, 1867, declared that no legal State government existed in Texas, and provided further for the military government of said State. The officers elected under the State constitution were removed from office and others appointed in their places. Among them the governor of the State, elected under the State constitution as amended in 1866, was displaced, and a provisional governor was appointed and held the office until September 30, 1869, when he resigned, and from that time until January 8, 1870, the executive duties were performed by an adjutant of the general in command, placed in charge of civil affairs. On April 16, 1870, by General Orders, No. 74, the military commander declared the State had resumed practical relations to the General Government, and all the authority conferred upon him by the reconstruction laws was remitted to the civil authorities.

Speaking of the powers exercised by the officer in command of Texas under the reconstruction acts, the supreme court of Texas say:

In Texas this officer exercised powers legislative and executive, if not judicial. (*Daniel v. Hutcheson*, 86 Texas, 57.)

In the same case the court say:

That the State was governed by military law, even though its own laws may to some extent have been recognized and administered, must be considered an established fact.

The power of the United States Government to impose such a rule upon the State must be recognized as fully, under the facts existing, as though Texas had theretofore been an independent sovereignty, having no relation to the United States than that usually sustained by one independent nation to another.

Civil war had existed of magnitude seldom exceeded, resulting in the overthrow by force of arms of the cause the State had espoused, and the occupation of her territory by a hostile army.

This occupancy was continued, and under the laws of war furnished ground for the establishment of military law. (86 Texas, 60.)

In another case the supreme court of Texas, in speaking of the reconstruction acts, say:

The National Legislature used its legitimate powers with moderation and magnanimity, endeavored to encourage the formation of republican governments in these States and bring the people back to a due appreciation of the law and of the liberty which is secured to the free enjoyment of every citizen under the Constitution. (33 Texas, 570.)

The character of the insurrection in the Philippines, the purposes of the insurgents, and the means by which they endeavor to accomplish them, are well described in the address of Hon. Elihu Root, delivered at Canton, Ohio, October 24, 1900.

In that address Secretary Root said:

Pio del Pilar, Aguinaldo's most active general, was the most notorious bandit in the Philippines. The orders for a combined attack and rising within the city of Manila on the 15th of February, ten days after the Senate confirmed the treaty, contained these directions:

First. You will so dispose that at 8 o'clock at night the individuals of the territorial militia, at your order, will be found united in all the streets of San Pedro, armed with their bolos and revolvers, and guns and ammunition, if convenient.

Second. Philippine families only will be respected; they should not be molested, but all other individuals of whatever race they may be will be exterminated without any compassion, after the extermination of the army of occupation.

That the malignant spirit prompting this murderous conspiracy is still potent with the insurgents is shown by the recent assassination of the officers and enlisted men who constituted the garrison at Samar.

So long as this spirit shall prompt any considerable number of insurgents to continue the insurrection, it is idle to say that the United States is not called upon to maintain its authority in said islands by force of arms; and so long as the United States is called upon to rely upon the military branch of this Government to maintain its authority in the Philippine Islands, just so long the territory of the archipelago will be hostile. The question which presents itself to the executive discretion is, what would be the consequence if the military forces were withdrawn? It is useless to say that territory in which active military engagements are prevented by the presence of superior military force, subject to the direction of one of the combatants, is thereby changed from hostile to peaceable.

In order to create and maintain conditions under which trade with the archipelago was possible, the United States, during the year ending June 30, 1901, stationed troops at nearly five hundred points in the islands. A list of the places so garrisoned and a summary of the prin-

cial events connected with the military operations in the Philippines from September 1, 1900, to June 30, 1901, is herewith transmitted as Appendix B.

V.—THE AUTHORITY OF THE PHILIPPINE GOVERNMENT TO IMPOSE EXPORT TAXES ON THE PRODUCTS OF THE ISLANDS, IF IT BE CONCEDED THAT THE TERRITORY HAS CEASED TO BE HOSTILE.

When the Constitutional Convention in 1787 undertook to determine the proper agency of government to exercise the authority to impose duties on imports and exports, a conflict of interests immediately produced a controversy. Under the Confederation the individual States exercised this authority in such manner as the interests of the State required or the legislative discretion determined. This plan not only occasioned great dissatisfaction to the States not supplied with good harbors, but also deprived the National Treasury of the most desirable means of securing revenues for the use of the General Government. The effort to confer this authority on the General Government met resistance from the States benefited by the system prevailing under the confederation and resulted in a compromise. (5 Madison's Papers, 486; 2 Elliott's Debates, 192, 196, 443, 444; 3 Elliott's Debates, 248; 42d Federalist.)

The grant of the desired authority to the General Government was provided by Article I, section 8, paragraph 1, as follows:

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, \* \* \* but all duties, imposts, and excises shall be uniform throughout the United States.

The right of the States to exercise the same authority was not surrendered, but was made dependent upon the consent of Congress.

Article I, section 10, paragraph 2, provides as follows:

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

From these two provisions it appears that the framers of the Constitution, while they desired to secure for the Federal Government all the duties imposed on foreign commerce, believed that a State which, for reasons of domestic policy, desired to tax such commerce more heavily than Congress did, should be permitted to do so, provided Congress assented thereto and the amounts realized were paid into the National Treasury.

For many years after the close of the war for independence the most important public question was that of making provision for the payment of the public debt incurred during that war. It would be remark-

able, indeed, if the framers of the Constitution had entirely ignored or positively and entirely renounced the right to levy duties on exports. I think these provisions of the Constitution contemplate that the Federal Government was to realize revenue from duties levied on exports, but that said duties were to be prescribed by the States. That is to say, as to *exports* the individual States retained the authority to fix the duties, as that authority had been exercised under the Confederation, changed in two important particulars, the State must secure the permission of Congress for such exercise, and the amount realized must be paid into the National Treasury. The reason for permitting the individual States to exercise this authority is obvious. At the time the Constitution was being framed there were no articles of export produced generally throughout the Union. The great staples of the South were not produced in any considerable quantity in the North, and the reverse was true. In view of this variety in the production of exports it was impossible, in levying an export duty, to select articles which would secure and preserve the equality of the burden of taxation among the individual States.

The principal articles of export at that time were cotton and grain. The burden of an export tax on cotton would be borne by the South and the burden of an export tax on grain would be borne by the North. If the North happened to control in Congress, it might tax the staples of the South; if the South were in power, it might place an export duty on the products of the North. It was necessary also to consider that the place of export might be a seaport in a State which would levy an export tax on articles not produced in that State or locality. These conditions are met and possible injustice and abuse guarded against by the provisions of the Constitution above quoted, and thereby was preserved the important right to tax both the incoming and outgoing commerce of the territory subject to the jurisdiction of the new government then about to be established.

If the framers of the Constitution intended that instrument should prevent the national authority from meeting a national emergency by providing regulations for, or placing restrictions upon, the outgoing commerce of the national territory, it is singular that Jefferson, the distinguished expounder and defender of the Constitution, and Madison, whose work during the convention and afterwards won him the name "Father of the Constitution," should have secured the enactment and enforced the provisions of the statutes known as the "Embargo Laws."

Numerous regulations by Congress of the export trade which are capable of uniform application and resulting burdens throughout the United States have been sustained by the United States Supreme Court. (*Pace v. Burgess*, 92 U. S., 372; *Turpin v. Burgess*, 117 U. S., 504; *Brown v. Houston*, 114 U. S., 622; *Woodruff v. Parham*, 8 Wall., 123; *Cooley v. Board of Wardens*, 12 How., 299.)

Under this doctrine, it follows that if the Philippine Archipelago were a State of the Union, such State, with the permission of Congress, could impose an export tax. It is now established that in territory subject to the sovereignty and possession of the United States, but outside the territorial limits of a State of the Union, the national authority may exercise the powers of both Federal and State Governments.

The United States, while they hold country as a territory, have all the powers of both national and municipal government. (*Shively v. Bowlby*, 152 U. S., 1, syllabus.)

At present the national authority of the United States in the Philippines is exercised by the executive department of the Federal Government, by and with the assent of Congress, and confirmed by the Congressional enactment known as the Spooner amendment.

Article I, section 9, paragraph 5, of the Constitution is as follows:

No tax or duty shall be laid on articles exported from any State.

The article in which this provision appears is the one wherein are set forth the powers conferred upon Congress and the limitations thereon. Said provision is in harmony with the doctrine that the authority to lay duties on exports was reserved to the States.

That the inhibition does not limit the authority of Congress when it shall undertake to legislate for the Philippines is apparent, since the prohibition directly refers and is confined to the exports "from any State." The limitation is imposed on the authority of Congress to regulate the commerce of a State and can not be considered a limitation on the power given by Article III, section 3, paragraph 2.—

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.

If it shall be insisted or determined that after the exchange of ratifications of the treaty of peace with Spain (1898) the territory of the Philippine Islands ceased to be foreign to the territory of the United States, it follows that the customs duties called "export taxes" can not be held to be in violation of the provisions of the Constitution prohibiting Congress from imposing taxes on *exports*. The Supreme Court of the United States has held in a number of cases that the word "export," wherever used in the Constitution in connection with commerce, refers exclusively to commerce with foreign territory. (*Woodruff v. Parham*, 8 Wall., 123, 136; *Brown v. Houston*, 114 U. S., 622; *Coe v. Errol*, 116 U. S., 517; *Turpin v. Burgess*, 117 U. S., 504; *Pittsburg Coal Co. v. Louisiana*, 156 U. S., 590, 600.)

In the case last cited (156 U. S., 600) the court say:

The terms "imports" and "exports" apply only to articles imported from foreign countries or exported to them. The inhibition imposed is the laying of duties on imports from foreign countries, and not on such as came from one State to another.

The Constitution does not say no tax or duty shall be laid on articles exported from any territory throughout the United States, but confines the prohibition to exports from a *State*. The language is explicit and admits of but one construction. The language is not as broad as is used in the requirement that "duties, imposts, and excises shall be uniform throughout the United States." The restriction is limited, territorially, to territory within the boundaries of any State of the Union.

It can not, in candor, be claimed that the Philippine archipelago is a State of the Union; yet, unless it is, nothing is to be derived from said provision of the Constitution, even if it be admitted that the territory of the archipelago is now incorporated into the United States and the territorial boundaries of the United States extended to include it.

In *Downes v. United States* (182 U. S.), Mr. Justice Brown says:

In determining the meaning of the words of Article I, section 6, "uniform throughout the United States," we are bound to consider not only the provisions forbidding preference being given to the ports of one State over those of another (to which attention has already been called), but the other clauses declaring that no tax shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all these was to protect the States which united in forming the Constitution from discriminations by Congress which would operate unfairly or injuriously upon some States and not equally upon others. The opinion of Mr. Justice White in *Knowlton v. Moore* (178 U. S., 41) contains an elaborate historical review of the proceedings in the convention which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (p. 105) that "although the provision as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption," they were originally placed together and "became separate only in arranging the Constitution for the purpose of style." Thus construed together the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several States," and that these prohibitions were intended to apply only to commerce between ports of the several States as they then existed or should thereafter be admitted to the Union.

If it is insisted that the territory of the Philippine Islands has ceased to be hostile, and that under the decisions of the Supreme Court in the insular cases the executive department is without authority to impose duties of any kind on articles passing between that territory and the United States, but that authority to impose any duties on such articles is vested in the legislative department of this Government, such contention is to be answered by calling attention to the provision of the "Spooner amendment," as follows:

All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired from Spain by the treaty concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested

in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion.

Such taxes, duties, imposts, and excises as Congress is at liberty to enforce at the forts in the Philippines the present government of the islands may enforce therein. The decisions of the Supreme Court in the insular cases determine that in legislating for Porto Rico or other territory outside of the territorial boundaries of a State of the Union, the legislative authority is not bound by the limitations of the Constitution relating to the exercise of the legislative power over territory within a State of the Union.<sup>a</sup>

VI. THE RIGHT OF THE UNITED STATES TO ADOPT AND ENFORCE REGULATIONS FOR TRADE WITH THE PHILIPPINE ISLANDS IS NOT CONTROLLED BY THE LIMITATIONS OF THE CONSTITUTION RESPECTING THE REGULATIONS OF TRADE WITH THE STATES OF THE UNION.

Reference has been made hereinbefore to the proposition that the ordinances and institutions created by the military government in territory occupied by the military forces of the United States, continued

<sup>a</sup> NOTE.—Since the foregoing was prepared and submitted the Supreme Court of the United States announced their determination of the Fourteen Diamond Rings case and also of *Dooley v. United States*.

In delivering the opinion of the court in the Diamond Rings case Mr. Chief Justice Fuller says:

"In *Downs v. Bidwell* the conclusion of the majority of the court was that an act of Congress levying duties on goods imported from Porto Rico into New York not in conformity with the provisions of the Constitution in respect to the imposition of duties, imposts, and excises was valid, \* \* \* although by the cession Porto Rico ceased to be a foreign country and became a Territory of the United States and domestic, yet that it was merely 'appurtenant' territory and 'not a part of the United States within the revenue clauses of the Constitution.'

"This view placed the territory, though not foreign, outside of the restrictions applicable to interstate commerce, and treated the power of Congress, when affirmatively exercised over a territory, situated as supposed, as uncontrolled by the provisions of the Constitution in respect of national taxation."

In delivering the opinion of the court in *Dooley v. United States* (filed December 2, 1901), Mr. Justice Brown says:

It follows, and is the logical sequence of the case of *Woodruff v. Parham*, that the word "export" should be given a correlative meaning and applied only to goods exported to a foreign country. (*Muller v. Baldwin*, L. R., 9, Q. B., 457.) If, then, Porto Rico be no longer a foreign country under the Dingley act, as was held by a majority of this court in *De Lima v. Bidwell* (182 U. S., 1) and *Dooley v. United States* (182 U. S., 222), we find it impossible to say that goods carried from New York to Porto Rico can be considered as "exported" from New York within the meaning of that clause of the Constitution. If they are neither exports nor imports, they are still liable to be taxed by Congress under the ample and comprehensive authority conferred by the Constitution "to lay and collect taxes, duties, imposts, and excises." (Art. I, sec. 8.)

after the treaty of peace had permanently attached the sovereignty of the United States to said territory, until modified or repealed by the action of the legislative department of the United States Government or by some legislative body exercising authority derived from Congress.

In *Dooley v. United States* (182 U. S., 222), speaking of the situation in Porto Rico after the exchange of ratifications of the treaty with Spain, Mr. Justice Brown says:

We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress.

In matters relating to internal or domestic affairs the authority of such government, so continued, would be the same as theretofore, and the governing authority justified in dealing with said affairs as necessity required and prudence dictated, restrained only by the established usages of nations.

The decision of the majority of the court in *Dooley v. United States* calls attention to the doctrine that, in matters not internal or domestic, but involving the relations, after the treaty was ratified, between the territory and inhabitants of Porto Rico and the Federal Government of the United States, the insular government of Porto Rico was not authorized to exercise a free hand. The decision in the *Dooley* case is not of controlling force over the proposition under consideration. The question in the *Dooley* case was whether or not the territory of Porto Rico was *foreign*. The question involved in the proposition under consideration is whether or not the territory of the Philippines is *hostile*.

The treaty of Paris, in dealing with the matter of sovereignty over the territory ceded by that instrument, went no further than to attach the sovereignty of the United States to said islands. Whether said treaty is considered as the inception of the rights of the United States or as the confirmation of rights acquired by conquest, the fact remains that the treaty provisions, as to sovereignty, stop at the point where they accomplish the result of attaching the sovereignty of the United States to the islands. The treaty itself, as to sovereignty, accomplishes no other or different result than would be accomplished by an original discovery of an island, and the taking possession thereof in the name of the United States. The importance of bearing in mind the limitations of the work performed by the treaty arises from the fact that the treaty is popularly believed to have accomplished many things which it did not do.

One important thing which the treaty *did not do*, was to *fix the relations which the ceded islands and the inhabitants thereof were to sustain to the Federal Government of the United States*.

The reason for not fixing said relations by treaty stipulations is that



the authority to fix such relations is not possessed by the treaty-making power of the Government of the United States. The authority so to do is vested in the Congress.

The question arose at the time the Louisiana Purchase treaty was considered by Congress. That treaty contained the following provisions:

ARTICLE III. The inhabitants of the ceded territory shall be incorporated in the Union of the States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

\* \* \* \* \*

ARTICLE VII. As it is reciprocally advantageous to the commerce of France and the United States to encourage the communication of both nations for a limited time in the country ceded by the present treaty until general arrangements relative to the commerce of both nations may be agreed on, it has been agreed between the contracting parties that the French ships coming directly from France or any of her colonies, loaded only with the produce and manufactures of France or her said colonies, and the ships of Spain coming directly from Spain or any of her colonies, loaded only with produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the port of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise, or other or greater tonnage, than that paid by the citizens of the United States.

When Congress was called upon to supply the legislation necessary to carry out the immediate requirements of the treaty, President Jefferson was assailed from all sides for having attempted to usurp the well recognized powers of Congress by consenting to these provisions. (*Annals of Congress*, 1803, pp. 432 et seq.)

The question again arose upon the acquisition of Upper California and New Mexico. It will be recalled that soon after the treaty of peace with Mexico was ratified, the people of Upper California and New Mexico attempted to settle for themselves the relations which they and the territory they inhabited were to sustain to the Federal Government of the United States, and proceeded to organize a government for the territory, and elected Senators and Representatives in Congress. These Senators and Representatives came to Washington and claimed recognition by the respective bodies of Congress; whereupon the desired recognition was refused. Congress went further, and caused an investigation as to whether President Polk had instigated the unwarranted action of the people of the newly acquired territory.

It will be remembered, that after the successes of the Union armies in the third campaign of the civil war, President Lincoln issued a proclamation inviting the people living in the rebellious districts to form loyal governments, under certain conditions prescribed by the proclamation. (13 Stat. L., 738.)

Pursuant to said proclamation, governments were organized in Louisiana and Arkansas in 1864, and in Tennessee in 1865. Congress refused to recognize these governments, and Senators and Representatives elected thereunder were denied seats in the respective Houses.

Although the organization of these governments was a war measure intended to further weaken the rebellion, the attempt of the Executive to determine and adjust the relations, existing and prospective, sustained by the territory and inhabitants of the rebellious districts to the Federal Government, caused the first decided antagonism between the President and Congress growing out of the conduct of the war. The insistence of President Johnson upon the right of the Executive to exercise this authority culminated in proceedings by Congress for his impeachment and immutably determined that under our form of government the power to fix and determine the relations to the Federal Government to be sustained by territory and inhabitants, not included within the geographical boundaries of a State of the Union, does not belong to the executive department, but rests in the sovereign people, to be exercised by their representatives in the two Houses of Congress.

This is the principle upon which rests the decision of the Supreme Court of the United States in *Fleming v. Page* (9 How., 603), wherein the court says (604-616):

By the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. \* \* \* As regarded by all other nations, Tampico was a part of the United States and belonged to them as exclusively as the territory included in our established boundaries, but yet it was not a part of the Union. \* \* \* Nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. \* \* \* His duty and his power are purely military. As commander in chief \* \* \* he may invade the hostile country and subject it to the sovereignty and authority of the United States. *But his conquests do not enlarge the boundaries of the Union nor extend the operation of our institutions and laws beyond the limits before assigned them by the legislative power.*

\* \* \* \* \*

The boundaries of the United States as they existed when war was declared against Mexico were not extended by the conquest; nor could they be regulated by the varying incidents of war and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States as previously established by Congress was still foreign.

The theory that the President and Senate, by an exercise of the treaty-making power, can determine and establish the relations to the Federal Government of the United States to be sustained by foreign territory and inhabitants, upon the territory becoming subject to the sovereignty of the United States, is based upon the doctrine that the President and Senate possess the powers under this Republic which are possessed by kings and kings' councils under a monarchy. It over-

turns and destroys the principle upon which this Republic is founded by denying that sovereignty is vested in the people.

Under all Governments additions to the realm, the privilege of participating in the Government, and the relations to be sustained to the prevailing sovereignty are matters to be determined by the sovereign. In the United States the sovereign is the people, not the President or the Senate.

In Europe the king is the sovereign and sovereignty is vested in him. He can therefore do as he likes in such matters or as his military forces enable him to do. A king can extend his kingdom to the four corners of the earth if he has the requisite military force. Having conquered a province, he can incorporate it into his kingdom or not as he sees fit; and allow the conquered inhabitants to participate in his government as much or little as he desires; and determine the status of the territory and its inhabitants under his sovereignty, including the relations to be sustained by such territory to the State of which it has become a dependency; but this great power of the sovereign is vested under our form of government in the people and not in the Chief Executive or the Commander in Chief of the Army and Navy. To permit the exercise of this power by the President is to concede to him the highest authority known to kings. To permit the exercise of this power by a military officer of however high degree, is to establish "militarism" in its worst and most obnoxious form.

The most the President and Senate can do by treaty stipulations, or a military commander can do by conquest, is to give the sovereign people an opportunity to say what shall be done with territory and its inhabitants. The will of the sovereign people in regard thereto is to be declared by the legislative department of the Government—that is, Congress. This authority is especially conferred on Congress by section 3 of Article IV of the Constitution, which provides that—

Congress shall have power to dispose of and make all needful rules and regulations respecting the territory \* \* \* belonging to the United States.

It was this difference between the President of the United States and the King of England to which the Supreme Court of the United States referred when, in speaking of the effect of the conquest of Mexico by the United States, it said:

In the distribution of political power between the great departments of this Government there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English Crown that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or in any other subject where the rights and powers of the executive arm of the Government are brought in question. (*Fleming v. Page*, 9 How., 618.)

Having in mind this want of authority on the part of the treaty-making power, the statesmen composing the American Commission

at Paris and the great President under whose persona' supervision the proceedings of the peace conference were conducted, carefully abstained from attempting to exercise this power. The question as to the effect of the transfer of sovereignty on the nationality of the inhabitants of the islands was dealt with in the treaty as follows: (Art. IX):

Spanish subjects, natives of the Peninsula \* \* \* in case they remain in the territory, may preserve their allegiance to the Crown of Spain by making \* \* \* a declaration of their decision to preserve such allegiance; in default of such declaration they shall be held to have renounced it and to have adopted *the nationality of the territory in which they may reside.*

It will be noted that the treaty does not provide that the nationality adopted is that of the United States. The nationality of the inhabitants was to follow the political fortune of the territory of the island in which the individual resided, and the political status of the islands was to be determined and declared by Congress.

Said Article IX of the treaty further provided:

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

Wherever in said treaty it was intended to include Cuba in the treaty provision, the stipulation is made with reference to "the territories relinquished or ceded by Spain," but in the stipulation above quoted the provision is confined to "the territories ceded to the United States," among which were the Philippines.

The expression "civil rights and political status" ought not to be interpreted as though it read "civil and political rights." Political status is the base on which political rights stand; the foundation on which are erected many privileges, benefits, and immunities, among which are political rights. There is a difference between the political status of territory and the political status of the inhabitants, but the two are so closely related as to be interdependent. It is manifest that the Treaty of Paris (1898) contemplated and provided that the political status of both territory and inhabitants of the islands ceded to the United States "shall be determined by Congress."

The treaty, being formulated, was submitted to the President, who communicated its provisions to the Senate for advice and recommendation of the body as to whether or not the proposed treaty should be ratified by the Executive. The Senate advised that the President ratify said treaty, and thereupon the President ratified it. By this action the treaty-making power of the United States confirmed the provisions of said treaty that the political status of the islands and their inhabitants "shall be determined by the Congress," and to the extent of the authority possessed by the treaty-making power of this Government made such provisions the law of the land. Therefore, both by the distribution of powers under our system of government

and the action of the treaty-making power, it devolves upon the Congress to determine the status of these islands and their inhabitants, including the relations which they sustain to the Federal Government of the United States.

The Senate did not confine itself to recommending the ratification of the treaty. In connection therewith the Senate passed the following resolution:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the citizens of the United States and the inhabitants of said islands.*

The investigation so far has proceeded on the theory that the sovereignty of the United States did not attach to the Philippine Archipelago until the treaty of Paris was agreed to in the conference and thereafter ratified and exchanged. In the opinion of the writer hereof, this theory is not correct, and the United States will be placed at a disadvantage and involved in unnecessary complications hereafter if such theory is accepted.

The position taken by the American Commission at Paris (1898) was that the sovereignty of the United States attached to the Philippines when Manila, the provincial capital, was occupied by the military forces of the United States as a result of military operations by which the Spanish sovereignty in the archipelago was overthrown. This condition was a sufficient basis of good title for the United States. So long as the United States continued to hold and occupy the islands neutral nations must recognize the United States as possessed of sovereignty thereover. As was said by the United States Supreme Court with regard to territory subjected to military occupation during the war with Mexico:

It is true that when Tampico had been captured and the state of Tamaulipas subjugated other nations were bound to regard the country, while our possession continued, as the territory of the United States and to respect it as such; for by the laws and usages of nations conquest is a valid title while the victor maintains the exclusive possession of the conquered country. \* \* \* As regarded by all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries; but yet was not a part of the Union. (*Fleming v. Page*, 13 How., 615.)

At the time of the peace conference in Paris in 1898, all the rights of Spain in Porto Rico, Guam, and the Philippines had not been obliterated. The sovereignty of Spain over these islands had been displaced and suspended, but the Spanish Government and sovereignty elsewhere had not been destroyed. The rights of the United States in said

islands were those of a belligerent; they arose from possession and were dependent upon the ability to maintain that possession. Under the doctrine of postliminy the sovereignty and rights of Spain would become superior to those of the United States, if by any means Spain again came into possession of any portion of said territory. The American Commission, therefore, required, as a condition precedent to a peace, that Spain surrender this right of repossession and assume toward the islands mentioned the same position as was occupied by the other nations of the earth. In short, the treaty of Paris (1898) *confirmed* the rights of the United States instead of *creating* them.

If the foregoing views are correct, it would seem to follow that the relations of the islands, affected by the treaty, to the Federal Government of the United States, including the Constitution thereof, remained the same after the ratification of the treaty as they were before; that is to say, the relations are those of territory, the conquest of which has been accomplished.

If it is contended that the treaty with Spain is to be interpreted so as to create a changed condition in the relations theretofore sustained by the territory of said islands to the Federal Government of the United States, who is competent to declare the proper interpretation? Primarily the controversy lies between the territory itself, and the inhabitants in their associated or collective capacity and the Federal Government of the United States. The territory and the inhabitants come to the Federal Government and say: By the treaty you are required to assume toward us a certain relation. The rights, privileges, and immunities of the Federal Government are involved. Its authority over said territory, considered as territory, and over the inhabitants, considered as a people, is challenged. It seems manifest that the questions thus presented must be referred to the political branch of the Government. The judicial branch is without jurisdiction over the parties to the controversy or the subject-matter. Let us suppose that the territory and inhabitants constituting the Territory of New Mexico were to go into court and insist that by the treaty of peace with Mexico the relations sustained by them to the Federal Government was that of a State of the Union. Would any court undertake to judicially determine such contention?

Questions involving the relations of the Federal Government to territory and the interpretation of treaties affecting the rights of the Federal Government are to be determined by the political branch; and that branch having determined the questions, the determination is binding upon the courts when they are called upon to determine questions as they arise upon a claim of right asserted by an individual or association capable of maintaining a proceeding in court. For example, let us consider that a question has arisen as to our national boundaries. The determination of a question of national boundary by the

political branch is binding upon the judicial branch. The interpretation of a treaty establishing a boundary made by the political branch is binding upon the courts. Questions of boundaries belong to our foreign relations, and as such are to be dealt with by the political branch of the Government.

In *Williams v. Suffolk Insurance Company* (13 Pet., 415), the court say (420):

And can there be any doubt that when the executive branch of the Government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and Government of the Union.

If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments a foreign island or country might be considered as at peace with the United States, whilst the other would consider it in a State of war. No well-regulated government has ever sanctioned a principle so unwise and so destructive of national character.

In *Foster & Elam v. Neilson* (2 Pet., 253) the court say (309) (Marshall, Ch. J.):

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the Government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practices of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature. Had this suit been instituted immediately after the passage of the act for extending the boundary of Louisiana could the Spanish construction of the treaty of St. Ildefonso have been maintained? Could the plaintiff have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful, and that his title under a Spanish grant must prevail, because the acts of Congress on the subject were founded on a misconstruction of the treaty? If it be said that this statement does not present the question fairly, because a plaintiff admits the authority of the court, let the parties be changed. If the Spanish grantee had obtained possession so as to be the defendant would a court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments and mark the limits of each.

In *United States v. Arredondo* (6 Pet., 691) the court say (711):

This court did not deem the settlement of boundaries a judicial, but a political, question—that it was not its duty to lead, but to follow, the action of the other

departments of the Government; but when individual rights depended on national boundaries, "the judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established." "If the course of the nation has been a plain one its courts would hesitate to pronounce it erroneous." "We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." (2 Pet., 307.)

In *Garcia v. Lee* (12 Pet., 511) the court say (516):

The question of boundary between the United States and Spain was a question for the political departments of the Government; that the legislative and executive branches having decided this question the courts of the United States were bound to regard the boundary determined upon by them as the true one.

In the opinion of the Supreme Court in the case of *Jones v. United States* (137 U. S., 202), written by Mr. Justice Gray, the law is thus stated:

Who is the sovereign *de jure* or *de facto* of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. (*Gelson v. Hoyt*, 3 Wheat., 246, 324; *U. S. v. Palmer*, 3 Wheat., 610; *The Divina Pastora*, 4 Wheat., 52; *Foster v. Neilson*, 2 Pet., 233, 307, 309; *Keane v. McDonough*, 8 Pet., 308; *Garcia v. Lee*, 12 Pet., 511, 520; *Williams v. Insurance Co.*, 13 Pet., 415; *U. S. v. Yorba*, 1 Wall., 412, 423; *U. S. v. Lynde*, 11 Wall., 632, 638.) It is equally well settled in England. (*The Pelican*, Edw. Adm. Append. D.; *Taylor v. Barclay*, 2 Sim., 213; *Emperor of Austria v. Day*, 3 De Gex, F. & J., 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. Div., 489, 497; *Republic of Peru v. Dreyfus*, 38 Ch. Div., 356, 359.) \* \* \* All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. (*U. S. v. Reynes*, 9 How., 127; *Kennett v. Chambers*, 14 How., 38; *Hoyt v. Russell*, 117 U. S., 401, 404, 6 Sup. Ct. Rp., 881; *Coffee v. Groover*, 123 U. S., 1, 8 Sup. Ct. Rep., 1; *State v. Dunwell*, 3 R. I., 127; *State v. Wagner*, 61 Me., 178; *Taylor v. Barclay*, and *Emperor of Austria v. Day*, above cited; 1 Greenl. Ev., sec. 6.)

In the case of the *James G. Swan* (50 Fed. Rep., 110) the court say:

As our Government is constituted, the President and Congress are vested with all the responsibility and powers of the Government for determination of questions as to the maintenance and extension of our national dominion. It is not the province of the courts to participate in the discussion or decision of these questions, for they are of a political nature and not judicial. The Congress and the President having assumed jurisdiction and sovereignty, and having made declarations and assertions as to the extent of our national authority and dominion above indicated, \* \* \* all the people and courts are bound by such governmental acts, declarations, and assertions, \* \* \* and the responsibility of maintaining the national authority within the boundaries so fixed, and to the extent asserted by the executive and legislative authority against foreign governments, rests with the executive and legislative branches of the Government.



In *Fleming et al. v.* Page the court say (9 How., 616):

But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest, nor could they be regulated by the varying incidents of war and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, *as previously established by the political authorities of the Government, was still foreign.*

If the views hereinbefore expressed are correct, it follows that—

1. The treaty-making power of the United States is without authority to establish the relations to the Federal Government of the United States to be sustained by territory and inhabitants acquired by conquest.

2. The treaty-making power in the instance of the late treaty with Spain did not attempt to fix said relations, but expressly provided that such relations should be determined by Congress.

3. If any question exists as to the relations now sustained by the territory of the Philippine Islands to the Federal Government of the United States, such question, since it involves the rights of the Federal Government, must be resolved by the political branch and is not subject to the judicial branch.

4. The territory of the Philippine Islands being hostile by reason of the insurrections therein, such territory and its inhabitants are thereby brought within the governing authority of the war powers of the nation, the exercise of which said powers is regulated by the laws of war and not by constitutional provisions, legislative enactments, or treaty stipulations intended to provide for the conditions of peace.

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WAR DEPARTMENT,  
*Washington, January 28, 1902.*

SIR: Referring to your several communications in respect of a number of suits instituted in the Federal courts of the United States to recover amounts paid to the government of the Philippine Islands as duties on imports into and exports from the territory of said islands, permit me to call your attention to the inclosed copy of a report by the law officer, Division of Insular Affairs, on "The right of the government of the Philippine Islands, instituted by the President of the United States, to regulate commercial intercourse with the archipelago, and, as an incident to such regulation, to impose import and export duties." This report sets forth the views and reasons therefor pursuant to which said import and export duties were collected.

The questions as to time and amount of payment, character of goods, place of origin, etc., involved in said cases have been referred to the local authorities in the Philippines for information in regard thereto. Upon receipt thereof you will be further advised.

Very respectfully,

The ATTORNEY-GENERAL.

ELIHU ROOT,  
*Secretary of War.*

## APPENDIX A.

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[Section 5, Chapter 3, 12 United States Statutes at Large, page 257, act of July 13, 1861.]

SEC. 5. *And be it further enacted*, That whenever the President, in pursuance of the provisions of the second section of the act entitled "An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose," approved February twenty-eight, seventeen hundred and ninety-five, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then and in such case it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States: *Provided, however*, That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury. And the Secretary of the Treasury may appoint such officers at places where officers of the customs are not now authorized by law as may be needed to carry into effect such licenses, rules and regulations; and officers of the customs and other officers shall receive for services under this section, and under said rules and regulations, such fees and compensation as are now allowed for similar service under other provisions of law.

[Sections 5 and 6, chapter 225, 13 United States Statutes at Large, pages 376, 377, act of July 2, 1864.]

SEC. 5. *And be it further enacted*, That whenever any part of a loyal state shall be under the control of insurgents, or shall be in dangerous proximity to places under their control, all commercial intercourse therein and therewith shall be subject to the same prohibitions and conditions as are created by the said acts, as to such intercourse between loyal and insurrectionary states, for such time and to such extent as shall from time to time become necessary to protect the public interests, and be directed by the Secretary of the Treasury, with the approval of the President.

SEC. 6. *And be it further enacted*, That so much of the fifth section of the act approved May twenty, eighteen hundred and sixty-two, and the fourth section of the act approved March twelve, eighteen hundred and sixty-three, as directs the manner of distributing fines, penalties, and forfeitures, is hereby repealed, and that, in lieu of the distribution thereby directed to be made to informers, collectors, and other officers of the customs, the court decreeing condemnation, may award such compensation to customs-officers, informers, or other persons, for any service connected therewith, as will tend to promote vigilance in protecting the public interests, and as shall be just and equitable, in no case, however, to exceed the aggregate amount heretofore directed by the said fifth section.

[Proclamation dated August 16, 1861, issued by the President pursuant to said act of July 13, 1861.  
See 12 United States Statutes at Large, page 1262.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, on the fifteenth day of April, eighteen hundred and sixty-one, the President of the United States, in view of an insurrection against the Laws, Constitution, and Government of the United States, which had broken out within the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, and in pursuance of the provisions of the act, entitled "An Act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose," approved February twenty-eight, seventeen hundred and ninety-five, did call forth the militia to suppress said insurrection, and to cause the laws of the Union to be duly executed, and the insurgents have failed to disperse by the time directed by the President; and, whereas, such insurrection has since broken out, and yet exists, within the States of Virginia, North Carolina, Tennessee, and Arkansas; and, whereas, the insurgents in all the said States claim to act under the authority thereof, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combinations exist, nor has such insurrection been suppressed by said States:

Now, therefore, I, Abraham Lincoln, President of the United States, in pursuance of an act of Congress, approved July thirteen, eighteen hundred and sixty-one, do hereby declare that the inhabitants of the said States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, (except the inhabitants of that part of the State of Virginia lying west of the Alleghany mountains, and of such other parts of that State and the other States hereinbefore named as may maintain a loyal adhesion to the Union and the Constitution, or may be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents) are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed; that all goods and chattels, wares and merchandise, coming from any of said States, with the exceptions aforesaid, into other parts of the United States, without the special license and permission of the President, through the Secretary of the Treasury, or proceeding to any of said States, with the exceptions aforesaid, by land or water, together with the vessel or vehicle conveying the same, or conveying persons to or from said States, with said exceptions, will be forfeited to the United States; and that from and after fifteen days from the issuing of this proclamation, all ships and vessels belonging in whole or in part to any citizen or inhabitant of any of said States, with said excep-

tions, found at sea, or in any port of the United States, will be forfeited to the United States; and I hereby enjoin upon all district attorneys, marshals, and officers of the revenue and of the military and naval forces of the United States to be vigilant in the execution of said act, and in the enforcement of the penalties and forfeitures imposed or declared by it; leaving any party who may think himself aggrieved thereby to his application to the Secretary of the Treasury for the remission of any penalty or forfeiture, which the said Secretary is authorized by law to grant if, in his judgment, the special circumstances of any case shall require such remission.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington, this sixteenth day of August, in the year of our  
[L. s.] Lord eighteen hundred and sixty-one, and of the Independence of the  
United States of America the eighty-sixth.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State*.

[Proclamation dated April 2, 1863, issued by the President, extending the restrictions on commercial intercourse, authorized by act of July 13, 1861, over certain districts affected by the insurrection in the late rebellious States, which were exempted from such restrictions by the proclamation of August 16, 1861. See 13 United States Statutes at Large, pages 730, 731.]

#### BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

##### A PROCLAMATION.

Whereas, in pursuance of the act of congress, approved July 13, 1861, I did, by Proclamation dated August 16, 1861, declare that the inhabitants of the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, (except the inhabitants of that part of Virginia lying west of the Alleghany mountains and of such other parts of that state and the other states hereinbefore named as might maintain a legal adhesion to the Union and Constitution, or might be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents), were in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof with the exceptions aforesaid, and the citizens of other states and other parts of the United States was unlawful, and would remain unlawful, until such insurrection should cease or be suppressed, and that all goods and chattels, wares and merchandise, coming from any of said states, with the exceptions aforesaid, into other parts of the United States, without the license and permission of the President, through the Secretary of the Treasury, or proceeding to any of said States, with the exceptions aforesaid, by land or water, together with the vessel or vehicle conveying the same to or from said states, with the exceptions aforesaid, would be forfeited to the United States.

And whereas, experience has shown that the exceptions made in and by said Proclamation embarrass the due enforcement of said act of July 13, 1861, and the proper regulation of the commercial intercourse authorized by said act with the loyal citizens of said states:

Now, therefore, I, Abraham Lincoln, President of the United States, do hereby revoke the said exceptions, and declare that the inhabitants of the States of Georgia, South Carolina, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, Florida, and Virginia, (except the forty-eight counties of Virginia designated as West Virginia, and except, also, the ports of New Orleans, Key West, Port Royal, and Beaufort in North Carolina,) are in a state of insurrection against the United States, and that all commercial intercourse not licensed and conducted as provided in said act between the said states and the inhabitants thereof, with the

exceptions aforesaid, and the citizens of other States and other parts of the United States, is unlawful, and will remain unlawful, until such insurrection shall cease or has been suppressed, and notice thereof has been duly given by proclamation; and all cotton, tobacco, and other products, and all other goods and chattels, wares and merchandise, coming from any of said States, with the exceptions aforesaid, into other parts of the United States, or proceeding to any of said States, with the exceptions aforesaid, without the license and permission of the President, through the Secretary of the Treasury, will, together with the vessel or vehicle conveying the same, be forfeited to the United States.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this second day of April, A. D. eighteen hundred and sixty-three, and of the Independence of the United States of America [L. s.] the eighty-seventh.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State*.

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**REPORT ON OBJECTIONS MADE BY THE REPRESENTATIVES OF  
THE HONGKONG AND SHANGHAI BANKING CORPORATION TO  
ACT NO. 53 OF THE PHILIPPINE COMMISSION, ENTITLED "AN  
ACT TO PREVENT DISCRIMINATION AGAINST THE MONEY OF  
THE UNITED STATES BY BANKING INSTITUTIONS."**

[Submitted May 6, 1901. Case No. 2820, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt, by reference, of a communication addressed to you by Messrs. Hopkins & Hopkins, counsel for the Hongkong and Shanghai Banking Corporation, setting forth certain objections to act. No. 53 of the Philippine Commission, entitled "An act to prevent discriminating against the money of the United States by banking institutions," together with your request for a report as to whether said act, "if imposed by the legislature of a State upon corporations exercising banking franchises under the laws of the State, would be in violation of the customary provisions of our State constitutions."

The act under consideration is as follows:

ACT No. 53.

AN ACT to prevent discriminating against the money of the United States by banking institutions.

*By authority of the President of the United States, be it enacted by the United States Philippine Commission, that:*

SECTION 1. Every bank of deposit in the Philippine Islands shall accept deposits both in the money of the United States and in Mexican or other local currency, and shall honor checks drawn on or repay such deposits in the kind of money in which they were made.

SEC. 2. A willful violation of the requirements of this act shall subject the manager or officer of the bank causing such violation, or taking part in it, to a punishment for each offense by a fine of not more than \$5,000, or by imprisonment for not more than one year, or both, in the discretion of the court.

SEC. 3. Nothing herein contained shall prevent a bank or its officers from declining in good faith to accept deposits so small in amount as to be unprofitable, but a discrimination in that respect between Mexican or other local money and that of the United States shall be deemed to be a violation of the requirements of this act.

SEC. 4. This act shall take effect on its passage.

Enacted November 28, 1900.

The objections set forth by Messrs. Hopkins & Hopkins are as follows:

1. That banks doing business in territory affected by said act are, by the provisions of section 1, deprived of their property without due process of law.

2. That the provisions of section 1 impose an undue restriction on the rights of contract possessed by the bank.

The first essential to a correct understanding of this matter is to find out the purposes of the Commission in passing said act, and the conditions with which they were called upon to deal. The report of the Taft Philippine Commission to the Secretary of War, dated November 30, 1900, furnishes the desired information. (See pp. 85-93.)

From said report it appears that the act is a remedial statute, intended (1) to prevent discrimination against the currency of the United States and (2) to remedy an evil resulting or anticipated from the export of Mexican silver coins from the Philippines to China.

From said report it appears that the necessity which occasioned the adoption of the act complained of, and others of a similar character, arose from the following condition of facts:

The Mexican silver dollar or peso has been for many years the principal medium of exchange in the Philippine Islands. The American occupation being accomplished, it became necessary to establish, if possible, a fixed ratio between American money and the prevailing currency, and to provide for the increased demands of commerce by increasing the volume of money in the islands. The banks recognized this, and on August 19, 1898, they addressed a communication to the American military authorities (in which the Hongkong and Shanghai Banking Corporation joined) setting forth these necessities, and, as a means of meeting them, requested that they be allowed to import Mexican silver dollars free of duty. The request was granted, and the military government cooperated with them in endeavors to increase the money supply and to maintain the ratio, suggested by the banks, of two Mexican dollars for one American dollar, by depositing in said banks \$4,000,000 of Mexican currency. The importation of Mexican coinage duty free was profitable to the banks, and they engaged therein; but the maintenance of the fixed ratio deprived them of opportunities for securing temporary benefits from speculative profits, and the Commission report that said banks did not cooperate with the military

government in that matter, but left the military government to sustain that burden alone. The only means of sustaining the ratio available to the military government was to establish and constantly replenish a deposit devoted to the exchange of American money for Mexican at the desired ratio. Lacking the hearty cooperation of the banks, even this means was not entirely successful under the extraordinary conditions existing in the Philippines. The task was soon rendered more difficult by the action of the banks in shipping large sums of Mexican dollars to China. The deplorable international complications arising in China and the advent of foreign troops caused an increased demand and advance in price for Mexican coinage in that country. Thereupon the banks in the Philippines exported to China vast sums of such coinage withdrawn from circulation in the Philippines. Regarding such exportations the Commission report as follows (pp. 89-90, Rep. Nov. 30, 1900):

Between the 27th day of August and the 1st day of November, 1900, the two banks aforesaid exported \$2,087,500, and the deposit of Mexican money belonging to the Government in those two banks was, during that same period, depleted nearly the same amount. The Hongkong and Shanghai Banking Corporation was by far the more active in this business of exporting Mexican money. During the period last stated it exported \$1,935,000, and the Chartered Bank of India, Australia, and China exported \$152,500. Between the 17th and 31st of October, \$1,312,650 of Mexican currency was exported by the two banks referred to and by private speculators. In the three days that elapsed between the publication of the proposed legislation placing a tax upon the export of Mexican dollars and its enactment on the 12th day of November, \$1,133,500 Mexican currency was exported; \$500,000 of that sum being exported by the Hongkong and Shanghai Banking Corporation, \$150,000 by the Chartered Bank of India, Australia, and China, and the remainder by private speculators.

In order to secure possession of as many Mexican dollars as possible and devote them to their own purposes, the banks adopted two rules. The first rule required every depositor to reduce each deposit to Mexican currency. The effect of this rule was (*a*) the depositors resorted to the fund of Mexicans provided by the military government for the purpose of maintaining the ratio, and thereby said Mexicans passed to the banks and were exported; (*b*) the currency of the United States was discredited in the minds of the inhabitants of the islands; (*c*) the burden of maintaining the desired ratio was increased. The second rule required depositors drawing against their deposits in the bank to accept payment of said drafts in such currency as the banks tendered. This enabled the banks to export the Mexican dollars coming into their custody through the ordinary channels of business.

To correct this increasing evil the Commission adopted two acts, requiring the payment of salaries of Government employees in United States money and the other imposing a duty of 10 per cent on Mexican silver coinage exported. These measures proving inadequate the act now complained of was adopted.

It is well established that banks and banking in the United States are subject to legislative regulation and control. In a recent case the supreme court of Kansas say:

The question with us is whether the banking business is of such a character as to warrant the legislature, in the exercise of the State's police power, to impose reasonable regulations upon the means and methods by which it is conducted. There are many occupations and lines of private business which the legislature, in the exercise of the internal police power, may rightfully regulate. Tiedman, in his work on Limitations of Police Power (p. 194), says: "It will probably not be disputed that everyone has a right to pursue in a lawful manner any lawful calling which he may select. The State can neither compel him to pursue any particular calling nor prohibit him from engaging in any lawful business, provided he does so in a lawful manner. It is equally recognized as beyond dispute that the State, in the exercise of its police power, is, as a general proposition, authorized to subject all occupations to a reasonable regulation wherever regulation is required for the protection of public interests or for the public welfare."

Enactments controlling the loaning of money and regulating the rate of interest upon the same have been sanctioned from the earliest times, and the nature of the business done by banks in dealing in money, receiving deposits for safe-keeping, discounting paper, and loaning money is such, and is so affected with a public interest, as to justify reasonable regulation for the protection of the people.

A well-known author in his treatise on banking uses the following language: "At common law the right of banking pertains equally to every member of the community. Its very exercise can be restricted only by legislative enactment, but that it legally can be thus restricted has never been questioned." (1 Morse, Banks, § 13.) The same subject was considered in the recent case of *State v. Woodmanse* (N. Dak., 46 N. W., 970), where it was said that "the business of banking, by reason of its very intimate relations to the fiscal affairs of the people and the revenues of the State, is and has ever been considered a proper subject of control and strictly within the domain of the internal police power of every State. As a matter of fact we have been unable to find an authority—and we have searched diligently—which has ever questioned the right of the legislature in the exercise of police power to regulate, restrain, and govern the business of banking." (*Blaker et al. v. Hood*, 53 Kans., 499 (1894); 36 Pac. Rep., 1115; see also *Cummings v. Spannhorst*, 5 Mo. App., 21; see also *People v. Utica Ins. Co.*, 15 Johns., 358; *People v. Barton*, 6 Cow., 290; *Curtis v. Leavitt*, 15 N. Y., 9; *State v. Williams*, 8 Tex., 255; *Nance v. Hemphill*, 1 Ala., 551; *People v. Brewster*, 4 Wend., 498.)

If it be conceded that a Government exercising sovereignty may properly provide and maintain a currency adequate in character and volume to the wants of the commerce in which its people are engaged, then the act under consideration is to be commended and not criticised.

Regarding the specific objections to said act set forth in the communication of Messrs. Hopkins & Hopkins, I have to report as follows:

The complaint that said act "has the effect of depriving the banks of their property without due process of law" is not well founded. That said act may reasonably be expected to have "the effect of depriving the banks" of unacquired profits of speculative assaults upon the currency of the Philippines and the good name of the money issued by the United States is doubtless true.



Banking is a lawful calling, and the right to pursue a lawful calling may be a valuable property right. But said right is subject to *jus publicum*, and this inferior right is to be exercised in harmony with "those principles by which the public good is to be considered and promoted." It does not follow that because a calling is lawful, one who adopts it may select any and every means of pursuing it; or that restraints or regulations in regard thereto, necessary for the protection of the rights of the public, are violations of the letter or spirit of constitutional guarantees of property rights.

The requirement of said act that "every bank of deposit in the Philippine Islands shall accept deposits both in the money of the United States and in Mexican or other local currency" is objected to as follows:

Thus, under this singular and capricious law, the manager of a bank, should he refuse to receive a deposit tendered by any objectionable person, no matter how dangerous to the safety of his institution or how obnoxious a character that person might be, would be liable to a fine of \$5,000 or imprisonment for one year. (See p. 7, letter of Messrs. Hopkins, Feb. 18, 1901.)

This complaint construes the provisions of said section as having reference to *depositors* instead of *deposits*. Since the act is remedial it must be construed as relating exclusively to the purpose sought to be accomplished. That purpose is to prevent the exportation and decrease of the volume of currency used in the Philippines. It would be a forced construction indeed that would make said section read: "Every bank of deposit in the Philippine Islands shall accept *as a depositor any person tendering deposits* both in money of the United States and in Mexican or other local currency." It must also be considered that section 3 of said act declares that *discrimination* between deposits of Mexican or other local money and the money of the United States is what constitutes the offense.

Since the act provides for inflicting a penalty, it is to be strictly construed in favor of a person accused of violating it. The objection referred to is based on a construction which is forced and unwarranted and therefore untenable.

The requirement of said act that depositors shall be paid in *kind* instead of *value* is complained of as making it necessary for the banks to go into the market and become unwilling speculators in a variety of coin. This necessity does not seem probable. In no event would the bank, if called upon to make payment in *kind*, be required to pay a greater number of *coins*, or *tokens*, than it had received. Apparently this rule is one of evenhanded justice. The only disadvantage resulting to the bank is that, in a measure, it is deprived of the opportunity for using its position and information to secure profits on the fluctuations in value of coins and other currency, and may thereby be induced to make effort to secure and maintain a stable value. But, if the objection were well taken, the requirement is no harsher than the

prevailing rule which enables a creditor to demand payment in the kind of money known as legal tender, which is by no means the only kind of money in use in the United States.

But the purpose of this requirement of the act is simple, apparent, and commendable, being to compel the bank to keep on hand sufficient Mexican coins to pay the deposits of Mexican coins, and make it unsafe for the bank to export any considerable number of them so long as they remain the favorite currency of the Philippines.

The contention that said act applies only to *incorporated* banks and is therefore class legislation, is answered by the opening words of the act, which are: "*Every bank of deposit* in the Philippine Islands shall, etc."

When one recalls the stringent provisions of the Federal banking act and of the bank laws of the several States regarding surveillance, inspection, regulation, and control of banking institutions and the penalties therein prescribed for acts and omissions purely *mala prohibita*, it is manifest that the act of the commission does not violate the general principles under which the banking business is conducted in the United States.

In general the provisions of laws above referred to are too well known to need recital. There is one of a character similar to those of the act under consideration, to which attention is directed. The act of Congress approved July 17, 1882, provides:

No national-banking association shall be a member of any clearing house in which such certificates (silver) shall not be receivable in the settlement of clearing-house balances. (Supp. to U. S. Rev. Stats., vol. 1, p. 357, chap. 290.)

The purpose of this enactment was to prevent discrimination against the money issued by the United States known as "silver certificates."

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The Secretary of War approved the views expressed in the foregoing report, and advised the attorneys for the Hongkong and Shanghai Banking Corporation as follows:

MAY 7, 1901.

GENTLEMEN: I have the honor to acknowledge the receipt of your communication of February 18, 1901, wherein you set forth certain objections offered on behalf of the Hongkong and Shanghai Banking Corporation to the legislative act of the American Philippine Commission, No. 53, entitled "An act to prevent discriminating against the money of the United States by banking institutions."

Your letter was referred to the law officer of the Division of Insular Affairs with instructions to examine the questions presented and report thereon. A copy of his report is herewith transmitted.

I concur in the conclusion reached by said law officer, that the provisions of said act do not contravene the principles established for the protection of property rights in the United States nor the accepted rules governing legislative regulation and control of the banking business in the United States.

Yours, respectfully,

ELIHU ROOT, *Secretary of War.*

MESSRS. HOPKINS & HOPKINS.

**IN RE, ORDER OF MAJOR-GENERAL OTIS REQUIRING SMITH, BELL & CO., A BANKING HOUSE AT MANILA, TO TURN OVER TO THE AMERICAN AUTHORITIES ONE HUNDRED THOUSAND DOLLARS, HELD BY SAID HOUSE AS THE PROPERTY OF THE INSURGENT FORCES IN THE PHILIPPINES.**

[Submitted October 10, 1899. Case No. 738, Division of Insular Affairs, War Department.]

**SYNOPSIS.**

1. Under the law of military occupation and the well-established doctrine of belligerent rights, the United States was authorized to require said banking institution to pay to the military authorities of the United States the amount owing to the insurgent organization.
2. The right of the United States to enforce payment and secure the fund did not depend upon the possession or surrender of the draft issued by the bank when the money was received by it.

**SIR:** This matter arises as follows:

Smith, Bell & Co. is a British banking firm, with principal place of business at Manila, P. I., and various branch houses at different localities in the Philippine Archipelago. On January 23, 1899, the branch house at Legaspi, Luzon, sold a draft for \$100,000 drawn in favor of Mariano Trias, who was the custodian of funds, or treasurer, of the insurgents. The military authorities of the United States called upon the firm at its Manila office and required said firm to pay over to the American authorities the sum of \$100,000, being the amount of said draft. The firm complied under protest. The draft was not in the possession of the authorities of the United States and was not delivered to Smith, Bell & Co. Said draft has not been presented by any person to said banking concern, or any of its branches, and payment thereon demanded.

Smith, Bell & Co. applied to the British Government to secure relief. The firm represents that it has agencies in a number of places in the island of Luzon, where its agents are in the power of the natives, and they fear that they will be compelled by force to deliver to the insurgents \$100,000 if said draft is presented for payment.

The State Department transmitted to the War Department a communication from the British chargé d'affaires at this capital, making known the desire of the British Government to afford Smith, Bell & Co. such protection and relief as is possible. Upon receipt of the communication from the State Department the matter was referred to Major-General Otis for report on the facts. Replying thereto Major-General Otis says:

Respectfully returned to the honorable the Secretary of War, Washington, D. C. Attention invited to my cablegram of June 27. The inclosed copy of letter of General Hughes contains some errors. He acted under my verbal directions in the

matter, and my information at the time was that the draft in question was drawn for \$146,000 instead of \$100,000. Inclosed and attached hereto is a true copy of the accepted and outstanding draft. It will be seen that it is drawn in favor of Mariano Trias, for funds received from General Luckban. It was accepted and made payable February 19, and on February 3, at Malolos, was indorsed to Sylvester Legaspi. Luckban was at the time and is still an insurgent general, commanding in the southeastern portion of Luzon and the islands of Samar and Leyte, where he has robbed and is still robbing the people without mercy. Trias was at the time the draft was drawn treasurer of the insurgent government, and he is now the general commanding the insurgent troops of southern Luzon. Legaspi succeeded him as insurgent treasurer.

The original draft is now in this city and will not be further negotiated. The party holding it has been informed that if he attempts to collect it or lets it pass out of his possession his house and lands will be confiscated to the United States, and he is thoroughly aware of that fact. The draft has already passed through the hands of several influential Filipinos, and it required some time to locate it.

It is conceded that the fund seized was intended to be used for promoting the insurrection and that the insurgents sought to utilize the bank as a means of transfer for said funds.

Under the laws and usages of war the United States may lawfully seize and retain such funds, and to that end may compel the person having such funds in his possession to pay over the same to the military authorities.

The most favorable view of the conduct of the bank in attempting to perform the service rendered the insurgents herein, is to consider the obligation assumed by the bank as creating an indebtedness to the persons associated in the insurrection and the draft as an evidence thereof. Such indebtedness may properly be collected by the United States as a military measure calculated to weaken the insurrection.

The real question involved appears to be as to the legality of said enforced collection, when the United States was not in possession of the written evidence of the indebtedness and therefore unable to surrender said writing to the debtor. Upon authority of the determination made of such question in the instance of the debts due the elector of Hesse-Cassel and collected by Napoleon, it may confidently be asserted that the action of the United States was lawful.

The elector of Hesse-Cassel was accustomed to sell the valor of his soldiers (Hessians) to other sovereigns. The money he received therefor he loaned to his subjects and to citizens of other German States on notes secured by real estate mortgages, payable to himself. After the battle of Jena he was forced to leave his principality, and on doing so carried away these notes and mortgages and thereafter retained possession of them. He entered the military service of Prussia, then at war with Napoleon. Hesse-Cassel was governed by the laws of military occupation until it was incorporated into the kingdom of Westphalia, over which Napoleon made his brother Jerome king, and

remained a part of that kingdom until 1813. During this period the Bonapartes, both Napoleon and Jerome, collected the amounts due on said notes and mortgages made payable to the elector and carried away by him. This seizure was justified upon the ground that the property was that of a person remaining in arms against the legitimate sovereign of the State. The Bonapartes had no difficulty in collecting such of these debts as were due from their subjects; but where the debtors resided in other States force could not be resorted to. To induce voluntary payment a portion of the debt was remitted. Upon the elector being again installed as ruler over Hesse-Cassel, he attempted to compel a second payment of the debts so paid to the Bonapartes. The question was, Whether debts owing to the elector were validly discharged by a payment to Napoleon and receiving from him a quittance in full? This question was finally determined in the affirmative. As to the exact point now being considered Phillimore says:

They rejected the doctrine that because the prince had retained possession of the instruments containing the written acknowledgments of the debtors he therefore had constructive possession of the debts. (Phillimore's *Int. Law*, III, 841.)

With reference to the same case Halleck says:

They rejected the consideration of the justice or injustice of the war, \* \* \* nor did they attach any importance to the fact that the prince had carried away with him and retained possession of the instruments containing the written acknowledgement of the debtor. (Halleck's *Int. Law*, 3d ed., chap. 34, sec. 29; see also Hall's *Int. Law*, 4th ed., p. 588; Snow's *Cases in International Law*, p. 381).

If the relationship between the bank and the insurgent organization was that of debtor and creditor, and the United States was justified in collecting said debt, it follows that the original creditor is without the right to require payment a second time. If by force he compels the surrender to him of money or other property upon a claim of existing indebtedness by reason of this transaction, such use of force is without the sanction of laws and usages of war as applied in civilized warfare. It would be plain plunder. It would be "the felonious and forcible taking from the person of another goods or money to any value by violence or putting him to fear," which is the legal definition of robbery. Such acts of outrage are the usual attendants upon insurrection, riots, and other lawless forces. The military forces of the United States are now being used to destroy the power of the insurgents in the Philippines to perpetrate outrages by force and intimidation. One step in the progress of this undertaking is to prevent the insurgents from deriving any benefit from this fund of \$100,000.

It may be advisable to inform Messrs. Smith, Bell & Co. of this fact, and, also, that said banking concern now owes recognition to the sov-

ereignty of the United States and obedience thereto in the Philippines. The owners should be made to clearly understand that the United States requires them to see to it that the insurgents shall not benefit from this fund. If to comply with this requirement it is necessary to withdraw their funds and employees from localities infested by insurgents, such withdrawal must be made.

The fact that this banking concern is operating under an English charter does not relieve it from obedience to the authority of the United States, nor enable it to deal with the insurgents with impunity, nor justify it in demanding indemnity from the United States when its dealing with the insurgents involve it in disaster—financial or otherwise.

If the views herein expressed are approved by the State Department it may prevent further complications if the State Department could induce the Government of Great Britain to inform Messrs. Smith, Bell & Co. that said Government assents to the views entertained by the United States regarding this matter. Messrs. Smith, Bell & Co. are probably acting in ignorance of the laws and usages of war and the comity of nations, but in undoubting faith that the British Government will uphold them in the exercise of rights accorded by the usages of trade in times of peace. The situation under the conditions existing in the Philippines is liable to create international complications, which could be obviated by a little judicious advice or admonition from a source respected by the intended beneficiary.

Meanwhile it might be well to ask Major-General Otis what, if any, objection or obstacle prevents the seizure of the draft.

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## THE CONFISCATION OF PRIVATE PROPERTY OF ENEMIES IN WAR.

[Submitted February 1, 1901. Case No. 2414, Division of Insular Affairs, War Department.]

### SYNOPSIS.

1. When the United States is engaged in war, foreign or civil, the President, as chief in command of a belligerent force, may prevent the shooting down of the soldiers of the United States by depriving the men who are doing the shooting of the means of securing ammunition.
2. The authority so to do is derived from the laws of war, and constitutes a belligerent right, the exercise of which is subject to the discretion of that branch of the Government which is charged with the conduct of belligerent undertakings.
3. For the accomplishment of this purpose the President may use all branches of the military establishment, including the several departments of a military government of territory subject to military occupation.

4. Should the President desire to utilize the services of the Federal courts of the United States in promoting this purpose or military undertaking, since these courts derive their jurisdiction from Congress and do not constitute a part of the military establishment, he must secure from Congress the necessary action to confer such jurisdiction upon said courts.
5. The laws and usages of war make a distinction between enemies' property captured on the sea and property captured on land. The jurisdiction of the courts of the United States over property captured at sea is held not to attach to property captured on land in the absence of Congressional action.
6. If it be necessary for Congress to confer authority before enemies' private property on land can be confiscated, such authority exists by virtue of the provisions of sections 5308 and 5309, Revised Statutes of the United States, and may be exercised against the insurgents in the Philippines, *provided* the insurrection therein is against "the Government of the United States."
7. If confiscation of private property is intended as a punishment for offenses of a criminal character against the Federal Government of the United States it is necessary for the legislative branch to define the crime, prescribe the penalty, and confer the jurisdiction to inflict such penalty.
8. If such confiscation is intended as a punishment for offenses against the military government of the Philippines, the legislative branch of that government may provide the necessary legislation.

SIR: I have the honor to acknowledge the receipt of your request for a report on the above-entitled matter, and in response thereto I have the further honor to submit the following:

The right of confiscation is a sovereign right. In time of peace the exercise of this right is limited and controlled by the domestic constitution and institutions of the Government. In time of war, when the right is exercised against enemies' property as a war measure, such right becomes a belligerent right, and as such is not subject to the restrictions imposed by domestic institutions, but is regulated and controlled by the laws and usages of war.

Under our form of government Congress may provide the ways and means of exercising this right, as it does an army and navy to prosecute a war, but the use and application of said ways and means devolve upon the Executive and those charged with the conduct of military operations.

All property within the enemy's territory is enemy's property and subject to capture and confiscation. (*Young v. United States*, 97 U. S., 39.)

The same rules, relative to capture and confiscation of property apply to civil wars as to wars between nations, for a like necessity exists for injuring and weakening the hostile force. *Miller v. United States*, 11 Wall., 308, 313; *The confiscation cases*, 20 Wall., 92; *Gay's Gold*, 13 Wall. 351; *The Amy Warwick*, 2 Black (U. S.), 636.)

Confiscation of private property is more easily justified in civil wars than in foreign wars, for the insurgents in levying war against the government to which they owe allegiance not only subject their property to the hazard of that war, but also are guilty of treason.

In exercising the right to confiscate enemies' property, modern nations make a distinction between property on the sea and property on land. The right exists alike in both cases, but the practice is to refrain from confiscating property on land for a period after the condition of war is found to prevail, while the seizure of property at sea is commenced as soon as war is recognized or declared to exist. The property of citizens of many nations is to be found on the sea, and, as the sea is a common highway, no presumption of hostility results from the property being there, such as results from its being in hostile territory; therefore prize courts are established for the purpose of determining the liability to confiscation of captures at sea. The jurisdiction and procedure of these courts are fixed by statute and common law, and continue through times of peace as well as times of war. Being specially provided to deal with property captured at sea, this jurisdiction is held not to attach to property seized on land. The courts of the United States are dependent upon Congress for their jurisdiction; therefore, in order that the courts of the United States may entertain proceedings regarding confiscation of property seized on land, it is necessary for Congress to confer authority therefor. (*Brown v. United States*, 8 Cranch, 110.)

Confiscation by court procedure is not the only means by which a belligerent nation may dispose of enemy's property, for the purpose of weakening that enemy or strengthening itself. Under the laws and usages of war all property situated in enemy's territory is presumed to be tainted with hostility and liable to confiscation, therefore it is not necessary to have that question judicially determined, as is done when property is captured at sea.

The final purpose of court proceedings in confiscation is to pass the title of the property to the capturing nation, and thereby enable it to convey the title to others. Under the laws and usages of war title to personal property passes with possession, and therefore title to such property passes to the captors when the capture is made complete and his possession becomes firmly fixed. It is well understood that capture passes the title to such property as arms, ammunition, and other munitions of warfare, or to property, public or private, of such character as may assist the enemy in promoting his undertakings.

Belligerent nations do not resort to court procedure to exercise the rights of impressment of property, reprisal, or the enforcement of military contribution. Yet the exercise of these rights constitutes confiscation, and the title to the property seized passes to the captor upon the capture being completed.

The rule as to real property is different. When the proprietary interests in real property belong to the public or belligerent sovereignty, the title passes to the capturing belligerent and remains there during the period it is occupied (actually or constructively) by the captor. If such occupancy becomes permanent, the title is permanent.



Under the laws and usages of modern warfare, when the title to real property is in a private individual the title does not pass by capture or hostile occupation of the territory. Such occupation, however, gives the occupying belligerent the right to confiscate real estate which is the subject of private ownership. This right is seldom exercised. Whether it is exercised or not usually depends upon the individual owners. If they persist in defying the new sovereignty, or refuse obedience to the military government instituted pursuant to the laws of military occupation, or wantonly violate others of the laws of war, or continue in unauthorized efforts to prevent the advent of peace, then recourse is had to confiscation of their lands and goods as a military measure for the accomplishment of the purpose of all military measures—to compel peace.

Such confiscation may be—

1. A military measure to deprive such enemy of means which he is using or is likely to use in opposition to the purposes and objects of the endeavors in which the belligerent making the confiscation is engaged.

2. A punishment for an overt act in violation of the laws of war, the laws of the military government of the territory, or the sovereignty to which the territory is subject.

In order to justify such confiscation it is necessary to establish certain facts relating to the individual and the use of the property which is being made, contemplated or probable. This produces a situation analogous to that of property captured at sea. It may or may not be liable to confiscation, and the question is a proper one to refer to a tribunal which may exercise judicial powers in investigation and determination.

When the United States is engaged in a war, which branch of the Government is authorized to declare the will of the sovereignty of the United States regarding the confiscation of private property of the enemy, prescribe the rules therefor, and means for their enforcement?

Undoubtedly Congress may exercise this authority, for the Constitution grants to Congress the right “to define and punish \* \* \* offenses against the law of nations,” and “to \* \* \* make rules concerning captures on land and water;” also “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department thereof.” (Section 8, article 1.)

During the civil war Congress exercised this authority and passed two acts, entitled as follows:

An act to confiscate property used for insurrectionary purposes. (App. Aug. 6, 1861. 12 U. S. Stat. at Large, 319.)

An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes. (App. Aug. 6, 1861. 12 U. S. Stat. at Large, 589.)

These acts were held to be a legitimate exercise of the war power and constitutional. (*Miller v. United States*, 11 Wall., 294.)

The attention of the Secretary of War is directed to the fact that the provisions of the act approved August 6, 1861, are continuing in effect, are not confined to the geographical area designated as the United States, and are declared by the Supreme Court to be an exercise of the war powers of this Government, powers which extend to and are exercised in any and every country wherein the United States becomes involved in war. The provisions of said act were incorporated in the Revised Statutes of the United States wherein it is provided as follows:

SEC. 5308. Whenever during any insurrection against the Government of the United States, after the President shall have declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person, or his agent, attorney, or employee, purchases or acquires, sells or gives, any property of whatsoever kind or description, with intent to use or employ the same, or suffers the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawful subject of prize and capture wherever found; and it shall be the duty of the President to cause the same to be seized, confiscated, and condemned.

SEC. 5309. Such prizes and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same (may) be seized, or into which they may be taken and proceedings first instituted.

The original act provided:

That if, during the present *or any future* insurrection against the Government of the United States, etc. (12 Stat. L., 319.)

If the insurrection in the Philippines is held to be an "insurrection against the Government of the United States," it would appear that Congress has already declared the will of the sovereignty of this nation and declared for the confiscation of the private property of the insurgents, and that proceedings in regard thereto were to be conducted in admiralty. If there are courts in the Philippines exercising admiralty jurisdiction, may they not also exercise jurisdiction in confiscation matters? If there are no courts in the Philippines exercising jurisdiction in admiralty, may not the jurisdiction be conferred upon them by the Commission by the exercise of legislative powers? The Supreme Court of the United States sustained the jurisdiction in admiralty conferred upon the Territorial courts of Florida by the Territorial legislature. (*American Ins. Co. v. Canter*, 1 Pet., 511.)

If this view is accepted, attention is directed to the fact that said provisions become operative "after the President of the United States shall have declared by proclamation that the laws of the United States

are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings." It is the "*laws*" not the *statutes* of the United States that that are to be declared "opposed."

The authorities established (in the judgment of the writer):

1. That the right to confiscate private property, as a military measure intended to promote the purposes of a war, is derived from the laws of war. The right is not conferred by legislation, but its exercise may be regulated thereby. (*Smith v. Brazleton*, 1 Heisk. (Tenn.), 59-61; *Mrs. Alexander's Cotton*, 2 Wall., 419, 420; *The Prize Cases*, 2 Black, 671; *Brown v. United States*, 8 Cranch, 122, 123, 149-151, 154; *Planters' Bank v. Union Bank*, 16 Wall., 483; *Gray Jacket*, 5 Wall., 369; *Sprott v. United States*, 20 id., 459; *Lamar v. Browne*, 92 U. S., 187.)

2. Where judicial proceedings are had to complete the transfer of title and provide a record thereof, such proceedings are *in rem*, and it is not necessary that the person of the proprietor should be in the custody of the court. (*The Confiscation Cases*, 20 Wall., 93, 104; *Miller v. United States*, 11 Wall., 268.)

3. A confiscation of private property intended to prevent the use of said property by the enemy as munition of war is an exercise of the war power of the nation made to protect and promote its belligerent rights. (*Young v. United States*, 97 U. S., 39; *Miller v. United States*, 11 Wall., 268.)

4. A confiscation of private property belonging to an insurgent, as a punishment for treason, is an exercise of the *municipal* power of the nation, made to protect and promote its *sovereign* rights. (*Ibid.*)

5. While engaged in suppressing an insurrection, the United States may exercise the war powers and the sovereign powers of a nation. (*Ibid.*)

When confiscation of property is intended as a punishment for crime, it is doubtless necessary for the legislative branch to authorize such punishment, for in the United States crimes and their penalties originate in statutes. Such is not the case when the war powers of the nation are called into action. A failure to observe this distinction has produced a theory that the right to confiscate private property of the enemy must be conferred upon the military authorities by the political branch of the Government, when in fact it is derived from that branch of international law known as the laws and usages of war. It is the right to utilize the courts in confiscation matters that is conferred by the political branch.

So high an authority as the American and English Encyclopædia of Law failed to observe this distinction, and in its first edition laid down the rule as follows:

The power to decide whether enemy property seized upon land shall be confiscated or not in any war waged by the United States is a political one, and Congress must decide the question in any such war. (Vol. 11, p. 459, 1st ed., title: International Law.)

This language is omitted from the discussion of International Law in the second edition, and therein it is stated:

It was decided by the Federal Supreme Court early in the nineteenth century that property found in the United States at the outbreak of a war with the country to which the owners of the property belonged was subject to confiscation, but that the

exercise of this right was a matter for the legislative department, and in the absence of an act of Congress providing for such confiscation the property could not be *judicially condemned*, a mere declaration of war not being sufficient for the purpose. (Vol. 16, p. 1152.)

In *Young v. United States* (97 U. S., 39) the court say (p. 58):

It is equally beyond doubt that during the war cotton found within the Confederate territory, though the private property of noncombatants, was a legitimate subject of capture by the national forces. We have many times so decided without dissent. *The authority for the capture was not derived from any particular act of Congress*, but from the character of the property, it being "potentially an auxiliary" of the enemy and constituting a means by which they hoped and expected to perpetuate their power.

The court further say (p. 67):

Property captured during the war was not taken by way of punishment for the treason of the owner any more than the life of a soldier, slain in battle, was taken to punish him. He was killed because engaged in war and exposed to its dangers. So property was captured because it had become involved in the war, and its removal from the enemy was necessary in order to lessen their warlike power.

Lincoln's famous question to those who complained of the arrest of Vallandigham presents the justifying principle. As applied to the situation in the Philippines, the question is: May not the President, as Commander in Chief of the Army and Navy, prevent the shooting down of American soldiers by depriving the men who are doing the shooting of the means of securing ammunition?

## II.

In the absence of legislation by Congress providing therefor, may the military government in the Philippines provide for the confiscation of property found on land in said archipelago, when the property is owned by individual insurgents, and authorize the courts of the islands to conduct proceedings in condemnation?

If the confiscation is intended to be a punishment for treason against the *Federal Government* of the United States, it is undoubtedly necessary for Congress to impose it.

If the confiscation is intended as a punishment for resisting the lawful authority of the military government of the Philippines, that government has the right to inflict it and may use its courts for that purpose.

This question arose during the existence of the military government in New Mexico.

The conquest of New Mexico by the military forces of the United States was accomplished by the campaign of 1846. In compliance with instructions given by the President, the officer in command, General Kearny, organized a civil government for the occupied territory and filled the executive and judicial offices by appointment. In Decem-

ber, 1846, the native inhabitants organized a conspiracy to overthrow the United States authority in New Mexico. On the night of January 15, 1847, the insurgents began hostilities and succeeded in killing the governor and a number of others—officials and citizens of the United States. The insurrection became general, and the declared purpose was to kill all the Americans and those Mexicans who had accepted office under the American Government. The insurrection was suppressed by the military forces of the United States and a number of the insurgents captured, and by the latter part of 1847 comparative safety was secured and maintained by stationing troops at various points. Of the insurgent prisoners, fifteen or twenty, perhaps more, were tried by courts-martial, sentenced to death, and executed. The others were turned over to the civil authorities of the military government for trial in the civil courts. A grand jury indicted four of them for the offense of treason against the United States. One was tried by a jury and convicted. The prisoner challenged the jurisdiction of the civil court and assailed the indictment on the ground that he was not a citizen of the United States, nor bound to yield allegiance to that Government. Strong pressure was brought to bear in his behalf, and the district attorney, Mr. Blair, referred the matter to Washington for instruction. He addressed his communication to Hon. John Y. Mason, then Attorney-General of the United States. Said letter was as follows:

SANTA FE, *April 1, 1847.*

SIR: You will doubtless have received before this reaches you the particulars of the late insurrection in the northern district of this territory through the public prints.

Of the prisoners taken in the suppression of that rebellion one of the leaders was executed under sentence of a court-martial, the remainder were turned over for trial to the civil authorities on the charge of treason against the United States.

At a term of the United States district court for this territory, held at this capital in March last, four conspicuous persons in the late rebellion were indicted for treason by the grand jury; three put upon their trial, one of whom was found guilty and sentenced by the court, one discharged under a *nolle prosequi*, and two obtained continuance to the adjourned term of the court in May next. Some twenty-five prisoners were discharged, the grand jury not finding sufficient evidence to indict them for treason.

About fifty prisoners are confined at Taos, in the northern district, awaiting trial at the term of the court commencing on the 5th instant, at which time both the circuit court for that county and the United States district court will be in session.

A number of the prisoners can be identified as active participants in the massacre of the late Governor Bent and others; these it is the intention to prosecute before the circuit court; but many others, who were active in the planning and exciting the late insurrection, I feel it my duty to prosecute for treason against the United States.

I have taken the liberty to lay these particulars before you, in order that I may understandingly ask your counsel and advice, which I have had a great desire to obtain before entering upon these prosecutions, but the want of opportunity to communicate with you did not permit it.

You are doubtless fully aware of the manner and form in which Brigadier-General Kearny declared New Mexico a territory of the United States, and its inhabitants

citizens, subject to her laws and liable to penalty for their infraction in like manner as citizens of any other Territory of the United States. By the authority in him vested he established a civil government, a superior court, with jurisdiction as a United States district court. In this last-named court I, by appointment, act as United States district attorney, and have felt it my duty to prosecute all acts of treason committed by the inhabitants of this territory, holding them responsible for all their acts as citizens of the United States.

In nearly all the cases tried the counsel for the defense have entered pleas to the jurisdiction of the court, which the court overruled, and in the case of Trujillo, who was convicted, the defense plead the jurisdiction of the court before the jury, declaring it to be unconstitutional to try any native inhabitant of New Mexico for the crime of treason against the Government of the United States until by actual treaty with Mexico he became a citizen. The court ruled out any consideration of this point by the jury, leaving it only the evidence and the facts upon which to make its verdict. Considering that as constituted, the court was bound by its oath to view all the inhabitants of New Mexico as citizens of the United States and to execute the laws in regard to them as such, leaving the responsibility of the question of its constitutionality to fall back upon the power which constituted it.

I am anxious to receive your counsel and advice at the earliest possible moiment in regard to all the matters above referred to.

Mails for this place will no doubt leave Fort Leavenworth regularly hereafter, and I trust you will oblige me by replying to this by the first opportunity.

Very respectfully, your obedient servant,

FRANK P. BLAIR.

HON. JOHN Y. MASON,

*Attorney-General of the United States.*

The Attorney-General referred the matter to the War Department. Hon. W. L. Marcy was then Secretary of War, and he addressed his communications relating to the matter to Col. Sterling Price, in command of the United States forces in New Mexico. From these communications the following passages are quoted:

WAR DEPARTMENT, *June 11, 1847.*

SIR:

\* \* \* \* \*

I am not aware that the President has yet received the petition for the pardon of Antonio Maria Trujillo, but I have conversed with him, and am now enabled to present his views on that subject.

The temporary civil government in New Mexico results from the conquest of the country. It does not derive its existence directly from the laws of Congress or the Constitution of the United States, and the President can not, in any other character than that of Commander in Chief, exercise any control over it. It was first established in New Mexico by the officer at the head of the military force sent to conquer that country under general instructions contained in the communication from this Department of the 3d of June, 1846. Beyond such general instructions the President has declined to interfere with the management of the civil affairs of this territory. The powers and authority possessed by General Kearny when in New Mexico were devolved on you as the senior military officer on his departure from that country. They are ample in relation to all matters presented to the consideration of the President in the communication of the acting governor, Vigil, dated 23d March last, and to you as the senior military officer, or to whosoever is such officer, he will leave such matters without positive or special direction. Your better knowledge of all the

facts and circumstances will doubtless enable you to take a wise and prudent course in regard to them.

The insurrection in that department called for energy of action and severe treatment of the guilty. It was but justice that the offenders should be punished. The safety of our troops and the security of our possessions required it. Beyond what was necessary to these ends it is presumed you have not gone, and the President sincerely hopes that the life of Antonio Maria Trujillo may be spared without disregarding them. With this suggestion he leaves the case of Trujillo to your disposal, as he does all others yet under consideration.

\* \* \* \* \*

Very respectfully, your obedient servant, W. L. MARCY,

*Secretary of War.*

Col. STERLING PRICE,

*Or officer Commanding U. S. Forces at Santa Fe, N. Mex.*

WAR DEPARTMENT,  
*Washington, June 26, 1847.*

SIR:

\* \* \* \* \*

The foundation of the civil government in New Mexico is not derived directly from the laws and Constitution of the United States, but rests upon the rights acquired by conquest. I call your particular attention to the fourth paragraph of my letter of the 11th of June as containing the principles on which the temporary government at New Mexico does or should rest. The territory conquered by our arms does not become by the mere act of conquest a permanent part of the United States, and the inhabitants of such territory are not, to the full extent of the term, citizens of the United States. It is beyond dispute that on the establishment of a temporary civil government in a conquered country the inhabitants owe obedience to it and are bound by the laws which may be adopted. They may be tried and punished for offenses. Those in New Mexico who in the late insurrection were guilty of murder or instigated others to that crime were liable to be punished for these acts either by the civil or military authority; but it is not the proper use of legal terms to say that their offense was treason committed against the United States, for to the Government of the United States as the Government under our Constitution it would not be correct to say that they owed allegiance. It appears by the letter of Mr. Blair, to which I have referred, that those in engaged in the insurrection have been proceeded against as traitors against the United States. In this respect I think there was error, so far as relates to the designation of the offense. Their offense was against the temporary civil government of New Mexico and the laws provided for it, which that government had the right, and, indeed, was bound to see executed.

On two former occasions I have addressed you in regard to Trujillo, who has been convicted of participating in the insurrection and the execution of his sentence suspended, and made known the decided wishes of the President that his punishment should be remitted.

Firmness may under some circumstances be required as an element of security to the citizens of the United States and other persons in countries conquered by our arms. When such is the case, it should be unshrinkingly exercised; but when a merciful course can be safely indulged it is strongly commended as promising in the end the best results. Such a course is prompted by the better feelings of our nature, and, on the ordinary principles of human action, can not fail to promote quiet, security, and

conciliation. I would therefore suggest that this course be adopted in all the other cases not finally disposed of so far as considerations of safety will allow.

\* \* \* \* \*

Very respectfully, your obedient servant,

W. L. MARCY,  
*Secretary of War.*

Col. STERLING PRICE,

*Commanding United States Forces, Santa Fe, N. Mex.*

For the reasons stated in the foregoing correspondence the President declined to exercise the power to pardon vested in him as Chief Civil Magistrate of the United States, but as Commander in Chief of the Army authorized the military governor to use his discretion in the matter, and the prisoner was pardoned by the governor.

The events resulting from this insurrection did not escape the attention of Congress. That body on July 10, 1848, passed a resolution calling upon the President for information in regard to the existence of civil governments in New Mexico and California, their form and character, by whom instituted and by what authority, and how they were maintained and supported; also whether any persons had been tried and condemned for "treason against the United States" in New Mexico.

President Polk replied to said resolution by message (dated July 17) received July 24, 1848, in which he discusses the character of military government, taking the position that such a government may exercise the "fullest rights of sovereignty." With said message he transmitted the correspondence above referred to, and also a letter received by him from the Secretary of War. In this message President Polk said:

The temporary governments authorized were instituted by virtue of the rights of war. The power to declare war against a foreign country, and to prosecute it according to the general laws of war as sanctioned by civilized nations, it will not be questioned, exists under our Constitution. When Congress has declared that war exists with a foreign nation, "the general laws of war apply to our situation," and it becomes the duty of the President, as the constitutional "Commander in Chief of the Army and Navy of the United States," to prosecute it.

In prosecuting a foreign war thus duly declared by Congress we have the right by "conquest and military occupation" to acquire possession of the territories of the enemy, and, during the war, to "exercise the fullest rights of sovereignty over it." The sovereignty of the enemy is in such case "suspended," and his laws can "no longer be rightfully enforced" over the conquered territory "or be obligatory upon the inhabitants who remain and submit to the conqueror. By the surrender the inhabitants pass under temporary allegiance" to the conqueror, and are "bound by such laws, and such only, as" he may choose to recognize and impose. "From the nature of the case no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty there can be no claim to obedience." These are well-established principles of the laws of war as recognized and practiced by civilized nations, and they have been sanctioned by the highest judicial tribunals of our own country.



The letter from the Secretary of War, which accompanied the President's message, was as follows:

WAR DEPARTMENT, *Washington, July 16, 1848.*

SIR: In compliance with your direction to be furnished with such information as may be in this Department, to enable you to answer the resolutions of the House of Representatives of the 10th instant, in relation to the civil governments in New Mexico and California; to the appointment of civil officers therein and the payment of their salaries; to trials for treason against the United States in New Mexico, etc., I have the honor to state that the documents from this Department which accompanied your message to the House of Representatives of the 22d of December, 1846, in reply to a request by that body for information "in relation to the establishment or organization of civil government in any portion of the territory of Mexico, which has been or might be taken possession of by the Army or Navy of the United States," contain all the orders and directions which had been issued by the War Department previous to that time and all the information then known here in regard to the form and character of the governments established in New Mexico and California, the authority by which they were established, and the appointment of civil officers therein.

The documents which accompany this communication contain all the information on the same subjects subsequently received at this Department, as well as all the orders and instructions issued from it since the date of that message.

The governments in New Mexico and California resulted from the conquest and military occupation of these territories, and were established by the military officer in chief command. They have been continued by the same authority, and whatever changes may have occurred in the office of governor have been generally made by the commanding military officer, without special instructions from this Department. In respect to California, instructions were given to General Kearny to proceed from New Mexico to that territory; and, on his arrival, to hold it and exercise, as far as was necessary, civil functions therein. Col. R. B. Mason, of the First Regiment of Dragoons, was afterwards sent to take chief military command of that territory whenever General Kearny, who had leave to return to the United States, should withdraw from it; and, as an incident of such command, to exercise the duties of temporary civil governor, or make proper arrangements for civil government therein.

It appears, by the accompanying papers, that Charles Bent, who had been appointed civil governor of New Mexico by General Kearny, was murdered in an insurrection which took place in January, 1847, and the office of governor, by that event, was devolved on Doniciano Vigil, who was secretary of state under Governor Bent.

The appointment not only of governor but of all the other civil functionaries was left to the military authority, which held the country as a conquest from the enemy. There is no other information in this Department in relation to the changes in the civil officers of either New Mexico or California than such as is contained in the documents which accompany this communication.

It is presumed that the expenses of the civil government in both of these territories have been defrayed by revenues raised within the same. There is nothing in the documents in the Department, nor have I information from any other source, to show that the salaries of officers of the civil government in either have been paid from the Treasury of the United States; or that any money has been drawn therefrom to defray any part of the expenses of the civil government established in them.

It appears, by the accompanying documents, that early in January, 1847, there was an insurrection in New Mexico, confined to that part of it which lies east of the Rio Grande, and many murders, mostly of American citizens, were perpetrated. By the energetic conduct of our military force it was suppressed; not, however, until after considerable loss of life on both sides. Some of the instigators of it, taken in arms,

were executed by the military authority; and others, deeply implicated in the crimes committed, were turned over for trial to a civil tribunal called a "district court of the United States." They were, in form, charged with treason against the United States, condemned, and some of them executed. In April, 1847, the person acting as district attorney on their trial addressed a letter to the Attorney-General of the United States (a copy of which is among the documents appended hereto), but it was not received until the latter part of May or the first of June of that year. By this letter, it appears that objections were made at the trials, by the accused, to the jurisdiction of the court. It was urged by them that being citizens of Mexico before the conquest of the territory they did not become thereby citizens of, and consequently could not be guilty of the crime of treason against the United States. These objections were overruled, the trials proceeded and resulted in the conviction and execution of several of the accused.

This letter was referred to this Department by the Attorney-General, with a suggestion that he would give an official opinion upon the questions presented, if, as is the legal course, it should be requested, but the error in the designation of the offense was too clear to admit of doubt, and it is only in cases of doubt that resort can be had to the Attorney-General for his opinion. On the 26th of June, 1847, I wrote to the commanding officer of Santa Fe a letter (a copy of which accompanies this communication), in which the incorrect description of the crime in the proceedings of the court is pointed out. It is therein stated that "the territory conquered by our arms does not become, by the mere act of conquest, a permanent part of the United States, and the inhabitants of such territory are not, to the full extent of the term, citizens of the United States. It is beyond dispute that, on the establishment of a temporary civil government in a conquered country, the inhabitants owe obedience to it, and are bound by the laws which may be adopted; they may be tried and punished for offenses. Those in New Mexico, who in the late insurrection were guilty of murder, or instigated others to that crime, were liable to be punished for these acts either by the civil or military authority, but it is not the proper use of legal terms to say that their offenses was treason committed against the United States. For to the Government of the United States—as the Government under our Constitution—it would not be correct to say that they owed allegiance. It appears by the letter of Mr. Blair, to which I have referred, that those engage in the insurrection have been proceeded against as traitors to the United States. In this respect I think there was error, so far as relates to the designation of the offense. Their offense was against the temporary civil government of New Mexico and the laws provided for it, which that government had the right and, indeed, was bound to see executed."

No copy or record of the proceedings of the court on these trials for treason has been received at this Department.

Very respectfully, your obedient servant,

W. L. MARCY, *Secretary of War.*

To the PRESIDENT.

(House Ex. Doc. No. 70, first session Thirtieth Congress. War Dept. Cong. Doc. 521.)

The situation in New Mexico at that time was as follows: The military government of New Mexico asserted sovereignty over said territory. The government of Texas also asserted sovereignty thereover. A portion of the inhabitants acknowledged allegiance to Old Mexico and a portion to Texas. A portion of the inhabitants acknowledged the authority of the United States resulting from the military occupation, but by far the greater portion of the inhabitants refused such acknowledgment and were attempting to expel the forces of the United States.

Attention is directed to the fact that at the time these trials occurred the treaty of peace with Mexico had not been signed, but the United States has always maintained that it acquired title to New Mexico and California by conquest, and not from the treaty. The treaty does not pretend to cede territory; it is a treaty of peace, in which Mexico acknowledged the rights secured by the United States by conquest. The title of the United States commences with the completion of the conquest, and dates from the period when the territory was occupied by the United States military forces.

The authority of the military government of New Mexico to institute courts, confer jurisdiction thereon, and prescribe the procedure therein, was recognized and sustained by the Supreme Court of the United States. (*Leitensdorfer v. Webb*, 20 How., 173.)

During the Revolutionary war the American colonies, severally, organized State governments. Nearly all, if not all, of these governments enacted laws for the confiscation of the property, both real and personal, of the Tories and nonresident subjects of Great Britain who continued their allegiance to the British Crown.

In regard thereto the Supreme Court of the United States say (11 Wall., 312):

It is not without weight, that when the Constitution was formed its framers had fresh in view what had been done during the Revolutionary war. Similar statutes for the confiscation of property of domestic enemies, of those who adhered to the British Government, though not residents of Great Britain, were enacted in many of the States, and they have been judicially determined to have been justified by the laws of war. They show what was then understood to be confiscable property, and who were public enemies. At least they show the general understanding that aiders and abettors of the public enemy were themselves enemies, and hence that their property might lawfully be confiscated. It was with these facts fresh in memory, and with a full knowledge that such legislation had been common, almost universal, that the Constitution was adopted. It did prohibit *ex post facto* laws. It did prohibit bills of attainder. They had also been passed by the States. But it imposed no restriction upon the power to prosecute war or confiscate enemy's property. It seems to be a fair inference from the omission that it was intended the Government should have the power of carrying on war as it had been carried on during the Revolution, and therefore should have the right to confiscate an enemy's property, not only the property of foreign enemies, but also that of domestic, and of the aiders, abettors, and comforters of a public enemy. The framers of the Constitution guarded against excesses that had existed during the revolutionary struggle. It is incredible that if such confiscations had not been contemplated as possible and legitimate, they would have been expressly prohibited, or at least restricted.

### III.

In the absence of Congressional authority, may the military authorities of the United States, engaged in suppressing the insurrection in the Philippines, confiscate property found on land, which property belongs to individual insurgents?

During the period of actual hostilities the commander of a belligerent

force maintaining military occupation possesses a large and extraordinary power. Such rule is an element of the *jus belli*.

The commander of the occupying army rules the territory within his military jurisdiction as necessity demands and prudence dictates, restrained by international law and obligations, the usages and laws of war, and the orders of his superior officers or the government he serves and represents. (Honsard's Parliamentary Debates, 3d ser., vol. 95, p. 80. Op. Atty. Gen., vol. 8, p. 369.)

A military government, used as a means for promoting the purposes and endeavors of active hostilities, is subject only to such conditions and restrictions as the laws of war impose upon it.

As was said by the Supreme Court of the United States, such government—

may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. \* \* \* In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace. (New Orleans v. Steamship Co., 20 Wall., 394.)

Commenting on this view of the law, the Texas supreme court say:

This language, strong as it may seem, asserts a rule of international law, recognized as applicable during a state of war. (Daniel v. Hutcheson, 86 Tex., 61.)

The war in the Philippines continues to be one of active hostilities—*flagrante bello*, or, at least, *non cessante bello*.

The conduct of such war devolves upon the President as Commander in Chief of the Army and Navy.

Bennett's Edition of Pomeroy's Constitutional Law, says:

When actual hostilities have commenced, either through a formal declaration made by Congress, or a belligerent attack made by a foreign government which the President must repel by force, another branch of this function as Commander in Chief comes into play. He wages war; Congress does not. The legislature may, it is true, control the course of hostilities in an indirect manner, for it must bestow all the military means and instruments, but it can not interfere in any direct manner with the actual belligerent operations. Wherever be the theater of the warlike movements, whether at home or abroad, whether on land or on the sea, whether there be an invasion or a rebellion, the President as Commander in Chief must conduct those movements; he possesses the sole authority and is clothed with the sole responsibility. (Sec. 706, p. 591.)

The same author further says:

This military law, or in other words, this code of positive, enacted, statutory rules for the government of the land and naval forces, is something very different from martial law, which, if it exists at all, is unwritten, a part and parcel of the means and methods by which the Commander in Chief may wage effective war, something above and beyond the jurisdiction of Congress, for that body has no direct authority over the actual conduct of hostilities, when war has been initiated. (Sec. 469, p. 383.)

Chief Justice Chase, in the minority opinion in *ex parte Milligan*, said (4 Wall., 139):

Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war.

This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns*. That power and duty belong to the President as Commander in Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, *nor Congress upon the proper authority of the President*.

In expressing his individual views in *Brown v. United States* (8 Cranch, 152) Mr. Justice Story said:

The act declaring war has authorized the Executive to employ the land and naval forces of the United States to carry it into effect. When and where shall he carry it into effect? \* \* \* Upon what ground can he authorize a Canadian campaign or seize a British fort or territory and occupy it by right of capture and conquest I am utterly at a loss to perceive, unless it be that the power to carry the war into effect gives every incidental power which the law of nations authorizes and approves in a state of war.

Continuing the discussion, Justice Story says (pp. 153, 154):

My argument proceeds upon the ground that when the legislative authority, to whom the right to declare war is confided, has declared war in its most unlimited manner, the Executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him as to the manner and extent, but he can not lawfully transcend the rules of warfare established among civilized nations. He can not lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty as to declaring war and limiting its effects rests with the legislature. The sovereignty as to its execution rests with the President. If the legislature do not limit the nature of the war all the regulations and rights of general war attach upon it.

The rule is that private property on land may be confiscated when the necessities of the military operations require such action. Who is to determine the question of necessity? In *Mrs. Alexander's Cotton* (2 Wall., 404) the court say:

Being enemies' property, the cotton was liable to capture and confiscation by the adverse party. It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted "to special cases dictated by the necessary operation of the war," and as excluding in general "the seizure of the private property of pacific persons for the sake of gain." The commanding general may determine in what special cases its more stringent application is required by military emergencies, while considerations of public policy and positive provisions of law and the general spirit of legislation must indicate the cases in which its application may be properly denied to the property of noncombatant enemies.

All departments of the military government of the Philippines are to be considered as instruments with which a belligerent is waging a war. Therefore its courts, as well as its cannon, may be used to

weaken its enemy and strengthen itself. If confiscation is resorted to as a military measure, the commander of the belligerent force having used its soldiers to capture property may use its courts to condemn such captures. Both agencies are instruments of actual war.

The case of *Brown v. United States* (8 Cranch, 110) does not apply to the situation in the Philippines, as understood by the writer.

In that case a private citizen of the United States, in no way connected with the military establishment and without authorization from the military authorities, seized private property alleged to belong to an individual enemy, and sought the assistance of a court of admiralty to condemn said property as prize of war, pursuant to the provisions of the laws regarding prizes captured at sea. The court sustained an objection to the jurisdiction.

In delivering the opinion of the court, Mr. Chief Justice Marshall said (pp. 122, 123):

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation the judicial department must give effect to its will. But until that will shall be expressed no power of condemnation can exist *in the court*.

The Chief Justice further said (pp. 121-122):

It does not appear that this seizure was made under any instructions from the President of the United States; nor is there any evidence of its having his sanction, unless the libels being filed and prosecuted by the law officer, who represents the Government, must imply that sanction. On the contrary, it is admitted that the seizure was made by an individual, and the libel filed at his instance by the district attorney who acted from his own impressions of what constituted his duty.

All parties to that action conceded that Congress alone could invest the courts of the United States with jurisdiction to hear and determine confiscation proceedings. The contention of the libellant was that, by the passage of the act declaring war against England, Congress had thereby declared that confiscation of enemies' goods on land was as permissible as confiscation of such goods on the sea, and the court had the same jurisdiction over goods confiscated on land as was conferred by the "prize laws" of Congress regulating the seizure of goods on the sea, and that a private citizen of the United States was thereby authorized to make the seizure and maintain condemnation proceedings in the courts. The issues were stated by the court as follows (p. 123):

The questions to be decided by the court are:

First. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?

Second. Is there any legislative act which authorizes such seizure and condemnation?

Since in this country, from the structure of our Government, *proceedings* to condemn the property of an enemy found within our territory at the declaration of war can be sustained only upon the principle that they are instituted in execution of some existing law.

And again, the court say (p. 126):

The acts of Congress furnish many instances of an opinion that the declaration of war does not of itself authorize *proceedings* against the persons or property of the enemy found at the time within the territory.

Evidently the "proceedings" referred to were proceedings in the civil courts of the United States. The holding of the court was that before the civil courts of the United States can assume jurisdiction, at the instance of a private citizen, to condemn the private property of an individual enemy seized on land by a private citizen of the United States, it is necessary for Congress to confer such jurisdiction and authorize private citizens to invoke it; and that the act declaring war against England did not confer such jurisdiction or authority, and the existing laws known as "prize laws" applied only to captures at sea.

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**IN THE MATTER OF TRANSMITTING OVER THE TELEGRAPH LINES OPERATED BY THE MILITARY GOVERNMENT OF CUBA MESSAGES RECEIVED FROM OR DESTINED FOR POINTS IN THE UNITED STATES, VIA HAITI AND SANTIAGO DE CUBA.**

[Submitted July 9, 1901. Case No. 2105, Division of Insular Affairs, War Department.]

SYNOPSIS.

1. Examination of the conflicting claims asserted by the International Ocean Telegraph Company, the Cuba Submarine Cable Company, and the French Cable Company, regarding their relative and respective rights under the several concessions granted said companies by the Government of Spain.
2. The Spanish concession to the Cuba Submarine Cable Company appears to confer upon that company the exclusive privilege of transmitting private telegrams passing between Santiago de Cuba, Cienfuegos, Batabanó, and the central station of Habana.
3. Said concession does not curtail the right of the Government to send Government messages between said designated points over the telegraph lines of the Spanish Government, nor to grant concessions for telegraph lines to points in Cuba which will not connect any two of the places reserved to the Cuba Submarine Cable Company.
4. The exclusive privilege conferred by the Spanish concession to the International Ocean Telegraph Company is confined to the exclusive right to ground in the coastal waters of Cuba any telegraph cable the other end of which is attached to any point in the United States. Otherwise than results from this grant the Government of Spain did not undertake to limit or control the international right of the United States to communicate with the island of Cuba.

SIR: I have the honor to acknowledge your request for a report on a matter arising as follows:

The International Ocean Telegraph Company maintains and operates a cable between the United States and Cuba. This company claims.

the exclusive right of telegraphic communication between the United States and Cuba continuing until January, 1906, by virtue of a concession from the Spanish Government, granted by royal decrees dated December 5, 1866, and May 13, 1867.

The Cuba Submarine Telegraph Company maintains and operates a submarine cable along the southern coast of Cuba, reaching from Santiago to Cienfuegos, and thence by land line to Habana. The original concession (December 31, 1869) embraced but three points, Santiago, Habana, and an intermediate mooring to be selected by the company, at one of three places, to-wit: Cienfuegos, Bay of Cochinos, or Batabanó. The company selected Batabanó for the third mooring, but soon thereafter sought authority for a fourth mooring to be effected at Cienfuegos. This was at first denied (April 9, 1870), then granted (July 10 and October 13, 1874), and revoked (August 6, 1876). Meanwhile the company had completed the mooring at Cienfuegos, and the decree of revocation declared this fourth contact would be tolerated as a special grace. Subsequently (September 30, 1895) the Government of Spain granted to the Cuba Submarine Company a concession for the establishment and operation of submarine cables connecting Cienfuegos with Manzanillo, Cuba, and touching at the towns of Casilda, Las Tunas, Júcaro, and Santa Cruz, these cables connecting at Cienfuegos with that established from Santiago to Habana.

The French Cable Company maintains and operates a cable from Hayti to Cuba, landing at Santiago under a concession granted by the Spanish Government dated April 1, 1887.

The United States and Hayti Telegraph and Cable Company maintains and operates a cable from New York City to Hayti.

All said cables were constructed and operated prior to the American occupation.

The Signal Service Corps, United States Army, reconstructed the overland telegraph line between Santiago and Habana, which line is now being operated by the military government of Cuba as a common carrier of telegraph messages.

The lines of the United States and Hayti Telegraph and Cable Company and the French Cable Company are now operated in conjunction and transmit messages between New York and Santiago, Cuba, via Hayti.

On arrival in Santiago, Cuba, messages destined for Habana or elsewhere in Cuba are tendered to the persons in charge of the overland telegraph line, operated by the United States military authorities, by whom they are accepted and transmitted upon payment of the rate charged the general public.

The International Ocean Telegraph Company and the Cuba Submarine Telegraph Company separately complain that said practice constitutes an infringement of the terms of the concession granted the French



Cable Company and also a violation of the concessionary rights of each of complainants.

The first thing to be ascertained is: What is the specific act of the government of Cuba of which complaint is made? This is to be answered: The action permitting the overland telegraph line from Havana to Santiago to be used as a common carrier of messages passing between points in the island of Cuba and points in the United States, via Santiago and Hayti, over the lines of the French Cable Company. The next inquiry is: What action by the government of Cuba is requested by complainant? This inquiry is to be answered: To refuse transmission over said land telegraph line to messages received from or intended for points in the United States via Hayti over the French cable. Realizing that the Secretary of War would desire to be advised as to how the relative and respective rights of these cable companies were regarded and treated under Spanish sovereignty, careful examination has been made of all available means of information on that subject.

The investigation induces the belief in the mind of the writer that while Cuba remained under Spanish sovereignty the Spanish Government might properly permit the French Cable Company—

1. To transmit from Hayti to Santiago de Cuba over its cable messages from the United States arriving in Hayti over the United States and Hayti cable.

2. To transmit from Santiago de Cuba to Hayti over said cable any message delivered to the Santiago office of the French Cable Company for transmission to the United States via Hayti and over the United States and Hayti cable.

3. To use the Government overland telegraph lines to transmit messages received in Santiago over the Hayti and Santiago cable, destined for any point in Cuba excepting Habana, Cienfuegos, and Batabanó.

4. To use the Government overland telegraph lines to transmit to Santiago de Cuba messages originating in Cuba and destined for points outside of Hayti, provided such messages were sent from a station on said overland lines other than Habana, Cienfuegos, and Batabanó.

Whether it was the practice of the Spanish Administration in Cuba to permit the French Cable Company to exercise said privileges is a question of fact not clearly and conclusively established by the documents filed herein.

That the Secretary of War may secure such information as the examination made affords, the following is submitted.

To support their complaint and request for relief, the International Ocean Telegraph Company and the Cuba Submarine Telegraph Company appeal to the treaty of peace (Paris, 1898) and the concessions granted by the Government of Spain.

The provisions of the treaty of peace invoked are those set forth in Article VIII, as follows:

That the relinquishment \* \* \* can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of \* \* \* or any other associations having legal capacity to acquire and possess property in the aforesaid territories.

The Secretary of War is relieved from the responsibility of determining whether or not such rights as are actually granted by the Spanish concessions involved herein are property rights, for the Attorney-General, with reference to the concession to the International Ocean Telegraph Company, has advised the Secretary of War that—

Concessions of this kind, which carry with them exclusive rights for a period of years, constitute property of which the concessionary can no more be deprived arbitrarily and without lawful reason than it can be deprived of its personal tangible assets. In a case in the Supreme Court of the United States (1 Wall., 352) Mr. Justice Field said: "The United States having desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the Government they superseded. If, therefore, the Western Union Telegraph Company has an exclusive grant applicable to Cuba for cable rights, which grant has not expired, it would be violative of all principles of justice to destroy its exclusive right by granting competing privileges to another company." (22 Op., 518.)

The necessity continues for the Secretary of War to ascertain if the grant of cable rights under consideration is exclusive. Such ascertainment is not a *judicial determination* of the question involved, its purpose being to enable the Secretary to intelligently exercise his authority in a matter wherein that authority has been invoked, to the end that the government of Cuba, by omission or commission, shall not participate in what the Attorney-General holds "would be violative of all principles of justice."

The International Ocean and Telegraph Company bases its claim of exclusive privileges on the following provisions of the concession under which the cable was constructed:

ARTICLE I. The grant that on the 19th of last June was temporarily given by a royal decree to Mr. William Smith, representative of the Telegraphic International Oceanic Company, to fix in some point of the island of Cuba the end of the telegraphic submarine cable, which has to start from the coast of Florida in the United States, is now given with a definite character and for the term of forty years for the placing of the cable or cables, which starting from the States of the Union, end in the said island of Cuba, provided that during the same period of time the United States Government does not deprive them of the exclusive grant allowed them. (See Doc. 3, No. 2105, Div. Ins. Affrs.)

The grant made by said royal decree was subsequently modified by royal decree dated May 13, 1867. Therein it was decreed as follows:

Considering that in this respect article 1 of above-named decree of 5th December, 1866, should be complied with, that in no case the term of duration of grants made, referring to the cables of Cuba to Porto Rico and to the Canaries, and to Mexico,

Panama, and the South American coasts, should exceed the permission granted to the International Ocean Telegraph Company, I decree as follows:

ARTICLE 1. The permission to land on the coasts of the island of Cuba the submarine telegraphic cables referred to by article 1 of the decree of 5th of December, 1866, will be reputed as a final grant made to the International Ocean Telegraph Company for the term of forty years, subject to the terms established in the second condition of schedule of terms for bidders on sale of said grant authorized by decree of same date, 26th February last. (*See Gaceta de Madrid*, May 17, 1867.)

The "second condition," to which reference is made in the decree above quoted, is as follows:

The company will make use of the telegraphic lines during forty years, the Government making no other grants during this time for the establishment of parallel lines. After the expiration of said term the Government will be free to accord permissions for new landings solicited, the company continuing in the enjoyment of the use of their line. For the ends of this article parallel lines will be such that starting from Cuba and Porto Rico will have submerged cables running approximately in the same direction. (*See Gaceta de Madrid*, Feb. 28, 1867.)

The International Ocean Telegraph Company insists—

1. That by said provisions it was granted, for a period of forty years, the exclusive privilege of telegraph cable traffic between Cuba and the United States, passing over cables running approximately parallel to the lines operated by it.

2. That the French cable and its New York connection by means of the United States and Hayti cable constitute such parallel line.

3. That the French Cable Company, by the terms of the Spanish concession, dated April 1, 1887, under which its cable was constructed, is prohibited from engaging in the United States traffic.

The Spanish concession granting permission to the French Cable Company to land its cable in Cuba contains the following provisions:

ART. 8. The concession is strictly limited to Hayti, so that there may be no infringement of the privileges conceded to the "International Oceanic" and "West India and Panama" Companies.

ART. 9. It is an express condition that if the concessionaire be desirous of extending the communication to another or to other points, he may not do so without obtaining the previous authorization of the Spanish Government.

#### DETERMINATION OF THE QUESTIONS INVOLVED HEREIN BY THE SPANISH MINISTRY IN 1889.

Upon examination it appears that the question of the right of the French Cable Company under its concession to engage in traffic with points in the United States and other points outside of Hayti, was raised in 1888 when said cable was being constructed.

The British consul at Habana, acting for and on behalf of the International Ocean Telegraph Company, the West India and Panama Cable Company, and the Cuba Submarine Cable Company called upon the Spanish administration in Cuba to prevent the landing of said cable in Cuba; basing said demand upon the averment that if con-

structed as projected said cable would enable its operators and owners to make arrangements or connections with overland telegraph lines in Hayti and Santo Domingo, and thereby reach the cable landed in Santo Domingo and extending therefrom to points reserved to the three English companies by prior and existing Spanish concessions.

The questions involved in the proposition advanced by the British consul at Habana became the subject of numerous diplomatic inquiries and an extended correspondence between the Governments of Spain, England, France, Hayti, Santo Domingo, Venezuela, and other South American countries. The controversy was eventually determined by the Spanish department of communications at Madrid, which determination was promulgated by royal decree issued by the Minister of Colonies on January 27, 1889. (See *Gaceta de Habana*, March 12, 1889.)

As evidenced by said decree, the Spanish authorities at Madrid determined—

1. That the concession granted by the Government of Spain to the International Ocean Telegraph Company conferred the right to attach to some point in Cuba one end of telegraphic submarine cable or cables, the other end of which attaches to the United States, and to maintain and operate such cable for forty years.

2. That by said concession, as declared by the decree of February 26, 1867, the Government of Spain bound itself to make no grants for the establishment of parallel lines during a period of forty years.

3. That the concession granted by the Government of Spain to the French Cable Company conferred only such rights as the Government of Spain could grant without infringement upon the prior rights secured to the International Ocean Telegraph Company.

4. That if constructed as projected, the line of the French Cable Company would not touch any point in the United States, and therefore could not be considered as parallel to that of the International Ocean Telegraph Company.

5. That in order to extend said cable so as to connect Cuba and the United States therewith, it would be necessary to secure authority so to do from the Government of Spain, which requirement afforded adequate protection to existing rights.

6. Therefore, the demand that the construction of said cable, as projected by the French Cable Company, be stopped, was refused.

The decree also considers the controversy regarding the right of the French Cable Company to engage in traffic with points beyond Hayti. This right was challenged before the cable was constructed, and at the time the effort was made to prevent the laying of the cable. With reference thereto the decree of January 27, 1889, states:

The British consul in Habana complains that the French company is transmitting telegrams to the said island to the prejudice of the British companies which enjoy privileges granted by Spain, as messages go over said cable addressed to countries

included in the concession granted to the West India Company, and in Santiago de Cuba they are resent to Europe \* \* \* through its employees \* \* \* and he requests therefore that the transmission of correspondence received in Santiago, as a stopping place, from or to points beyond Hayti, be not permitted. That by a royal order of September 8 of the present year it was ordered, that until this section should render the reports requested of it, the superior authority of the island and his delegates should exercise surveillance over the service of the cable in question for the purpose of preventing that it present for transmission in the offices of other companies, under the guise of messages from Santiago de Cuba, those which proceed from points beyond Hayti, and that no direct nor indirect violation of the conditions stated in their concession be allowed.

At the time the controversy was considered at Madrid (January, 1889) the United States and Hayti cable was not constructed. The only cable connection between Cuba and the United States was the line from Florida to Habana, owned by the International Ocean Telegraph Company. If the French Cable Company received a message from any source for transmission to the United States, it was obliged to turn over said message to the International Ocean Telegraph Company, or its auxiliary, the Cuba Submarine Cable Company. Therefore the Spanish authorities considered that the International Ocean Telegraph Company had no occasion to complain. At that time (January 27, 1899) the cable between Venezuela and Santo Domingo was in operation, and the French Cable Company by arrangements therewith was engaged in traffic with the countries of Central and South America. The West India and Panama Cable Company held a concession from the Government of Spain for the construction of cables between Cuba and these countries, which, that company contended, gave it the exclusive privilege of engaging in the Cuban-South American traffic. The British consul in Habana, for and on behalf of said West India and Panama Cable Company, called upon the Spanish administration to prohibit and prevent the French Cable Company from engaging in traffic between Cuba and South America by using said independent cables. In defense of its action in engaging in the traffic of South America, the French Cable Company called attention to the fact that, by the action of the Government of France, the cable from Haiti to Cuba had been declared an international line, and subject to the rules prescribed by the international agreement concluded at St. Petersburg July 10, 1875, to which agreement both France and Spain were parties; that said agreement provided as follows:

ARTICLE XXX, PAR. 3. No office, after being called, can decline to receive telegrams presented to it, whatever be the destination. In cases of obvious error, however, the transmitting bureau is bound to correct it as soon as it is notified by the corresponding bureau through a service notice.

It appears to the writer that the controversy in 1889 between the West India and Panama Company and the French Cable Company arose from a similar condition of fact, and presented the question

involved in the existing controversy between the International Ocean Telegraph Company and the French Cable Company.

The decree of January 27, 1889, disposes of the claim and demand made by the West India and Panama Company as follows:

As has been stated in the introduction to this report, the concession of the cable between Cuba and Haiti contains two restrictions: "It is limited strictly to Haiti," according to clause 8, in order that the privileges granted to the International Oceanic and the West India Panama companies be not violated; and by the 9th it is prescribed "That if the concessioner should desire to extend communications to one or more other points he can not do so without first obtaining authorization therefor from the Spanish Government." It was furthermore declared by clause 19 that said cable was subject to the rules established in the international convention of St. Petersburg, as well as to any others to which Spain may have been appointed. The concessioner complied with these conditions; and the cable is moored at San Nicolas, of Hayti, without having been extended to any other point, and without touching, therefore, any points which were reserved by the Spanish Government to the British companies, according to official reports and other data which appear in the proceedings. If Venezuela, the Netherlands, Santo Domingo, and Hayti have established, for the protection of their own interests, telegraphic cables and overland lines connecting La Guaira, Curaçao, Puerto Plata, and San Nicolas, and utilizing for communication with the United States and Europe the cable of Hayti to Cuba, the only line at present in service for said purpose, Spain must respect acts of sovereignty of friendly nations and not object to the transmission over said cable of messages from said points or to the same, complying with the convention above mentioned, according to which the contracting parties recognize to each individual the right to correspond by means of the international telegraphs, reserving the right to detain such messages which are included in the cases mentioned in No. 7.

Apparently the Spanish authorities considered that international communication involved rights appertaining to each nation affected; and that an exclusive privilege of controlling international communication could be secured only by the affirmative action of the several nations whose rights were involved. From this it followed that Spain could not control the passing of messages from one end to the other of an international cable, once the message was received into the hands of the cable company, excepting, of course, the exercise of the right to prevent the transmission of messages inimical to the State and the powers arising from the condition of war.

But it did not follow that Spain was precluded from controlling the means of distributing, in Spanish territory, by telegraph, any and all messages received over cables grounded in Spanish territory, or of communicating to the office of the cable company messages which starting from points in Spanish territory, sought to reach said cable by telegraphic wires subject, in their entire length, to Spanish authority.

This proposition also was considered in the decree of January 27, 1889. The question was presented by the complaint of the British consul at Habana, made on behalf of the Cuba Submarine Telegraph Company. That company had secured a concession from the Government of Spain

authorizing it to lay a submarine cable around the island of Cuba, touching at various points, as hereinbefore stated. The Government of Spain bound itself not to grant to individuals or associations a concession for either overland or submarine telegraph lines touching the points reserved to the Cuba Submarine Company. The Government continued to have the right to construct Government lines to all parts of the island, including those reserved to the Cuba Submarine Company, and to grant concessions to individuals or associations for the construction of lines connecting points in the island, other than those reserved to the Cuba Submarine Company, with each other or with any one of the points reserved to the company. In the exercise of the right so reserved, the Spanish Government constructed an overland telegraph system connecting various towns in the island, among others Habana and Santiago. The French Cable Company sought to use said system of overland telegraph lines to distribute messages originating outside of Hayti and arriving at Santiago over the French cable, and to collect and transmit to its Santiago office messages originating in Cuba and destined for points outside of Hayti. The Cuba Submarine Cable Company insisted that such use of the Government telegraph lines in Cuba by the French Cable Company was a violation of the rights of the Cuba Submarine Company and the obligations of the Government of Spain. The question thus raised was, What use, if any, may be made by the French Cable Company of the Spanish Government telegraph lines in Cuba? With reference thereto said decree of January 27, 1889, sets forth the following:

The latter company (Cuba Submarine) was authorized on December 31, 1869, by a decree of the provisional government, to establish and operate a submarine cable to connect the city of Santiago de Cuba with Habana, touching at Cienfuegos, the Bay of Cochinos, or Batabanó, as it may see fit. The route of the said cable, according to article 2 of the concession, shall start from the Bay of Santiago de Cuba, continue along the southern coast of the island to the mooring point which may be selected from among the three aforementioned, shall connect with an overland line simultaneously established by the concessioner, which latter line shall terminate in the central station of Habana. The Government shall not grant to any person or private company permission for the establishment of another overland or submarine line connecting Santiago de Cuba, the landing point of this cable, and the central office of Habana, the only three points of contact which this line will have in the territory of the island, and over which telegrams of a private character only shall be transmitted.

\* \* \* \* \*

According to the explicit terms of this concession the Cuba Submarine Company has no other privilege than that of operating the cable granted, without any other person or company being permitted for a period of forty years to connect with each other, by overland or submarine lines, the points indicated in the concession, viz, the city of Santiago de Cuba, the intermediate mooring point, and the central station of Habana. The concessioner selected Batabanó as the third point of the island where the cable was to land, but soon thereafter authorization was requested to touch also at Cienfuegos and establish there a telegraph station, which was alter-

nately denied and granted by royal orders of April 9, 1870, July 13 and October 10, 1874. But the Government did not adhere to these resolutions, and by royal decree of August 6, 1876, it was declared that the royal orders mentioned did not produce any legal effect, as they altered many of the essential bases of the concession, but that as a special grace, and in consideration of the fact that the cost of the cable and its landing at Cienfuegos had already been defrayed, this fourth point of contact with the island would be tolerated as long as the Government or the Governor-General of Cuba would consider it advisable. But the Government always retained the privilege of establishing for its service lines parallel to the latter, and to grant the establishment and operation of others which, starting from points other than those indicated in the concession and royal decree which extended it, may touch some of them without placing them in communication with each other; that is to say, that from any point in the island not touched by the cable of the Cuba Submarine Company telegraph lines may be laid to the city of Santiago de Cuba, or to Cienfuegos, or Batabanó, or to Habana.

The conclusion reached by the authorities at Madrid on the several subjects under consideration is set forth in said decree, as follows:

But as the administration has not the power of imposing upon the concessioner of the cable between Cuba and Hayti more obligations than those established in the contract, these are the only ones which are to be examined in connection with the privileges which the other companies invoke, in order to decide whether said cable can or can not, in accordance with the international convention above mentioned, transmit messages from points beyond the extremes of its line. Reassuming what has been stated, therefore, the Section is of opinion: 1. That the International Oceanic Company only obtained an exclusive power for forty years to lay and operate submarine telegraph cables between the United States and Cuba, which privilege has not up to the present time been violated by the cable of Cuba to Hayti, as this line can not transmit messages from and for the United States unless they pass over the cables of said company. 2. That the West India and Panama Company was authorized by a royal decree of May 28, 1868, and by the document of conditions of the same date, to establish and operate for forty years telegraphic cables between Cuba and Porto Rico, and between Cuba and Mexico, and Panama and the coasts of the South American continent, and that, not having complied strictly with the conditions of the contract as stated in the body of this report, it behooves Your Excellency to decide whether the case has arrived to reestablish the force and vigor of the original decree of concession, the only one which regulated in due form the juridical relations of the administration and of the company, and to declare that the royal orders which may have altered the essential bases of the concession did not produce any legal effect, as was done in a similar case, in concurrence with the Council of State in full, by royal decree of August 6, 1876, which was confirmed by a royal decree decision of July 6, 1878. 3. That until the privilege invoked by the West India Company is repealed or declared to be forfeited the latter only has the right to prevent the laying and operation of telegraphic cables between Cuba and Porto Rico and between the former and the other points mentioned in the concession, except in Mexico, which line was granted on August 13 last to Mr. Augustus Ghirlande. 4. That the Cuba Submarine Company has the privilege for forty years of no other company or private individual placing in telegraphic communication overland or by water the four points indicated in the concession and the royal decree which extended it, which are the city of Santiago de Cuba, Cienfuegos, Batabanó, and the central station of Habana, by establishing parallel lines which communicate them with each other; but it can not be prevented that a cable which reaches the coasts of Cuba communicate with Habana or any other place of the island, provided that it does not touch at Santiago nor at any of the mooring places reserved to the Cuba Submarine



Company. 5. That the concessioner of the cable of Cuba to Hayti has conformed to the present time, as it appears from the proceedings, to the conditions of the concession, as said cable does not go beyond Hayti, and as the latter is an international telegraphic line, subjected by the Government itself to the convention at St. Petersburg, it is not possible, without acting in contravention thereto and without injuring legitimate interests of friendly nations, to prevent that there be transmitted over the line mentioned any messages from points beyond its two terminal stations; *therefore the definite opening of the same to international service should be authorized at once and permission be granted for its communication with the overland telegraph lines which the Government may have established in places which are not reserved by its concession to the Cuba Submarine Company.*

I am unable to find any subsequent decrees relating to said matters issued by the authorities at Madrid.

It therefore appears to the writer:

First. That under the terms of the Spanish concession to the International Ocean Telegraph Company, as construed by the Spanish authorities, that company is without the right to object to the use of the Government overland telegraph lines in Cuba for the transmission of messages received by, or intended for, the French cable grounded at Santiago, whatsoever their place of origin or destination, since the exclusive privilege granted by said concession is that of "placing" in Cuba a telegraph cable, the other end of which is "placed" in the United States.

Second. That under the terms of the Spanish concession to the Cuba Submarine Telegraph Company, as construed by the Spanish authorities, that company has the right to object to the use of the Government overland telegraph lines in Cuba for the transmission of messages received by the French cable at Santiago and destined for the central station at Habana, or Cienfuegos, or Batabanó, and also to object to the transmission over Government telegraph lines of messages originating in any of said places and destined for points outside of Hayti over the French cable.

Further proceedings relating to the controversy were had under Spanish sovereignty, as follows:

The royal decree of November 25, 1897, provided for autonomous government in Cuba. By said decree there was conferred upon the local administration of the autonomous government "exclusive cognizance of all matters of a purely local nature, which may principally affect the colonial territory."

Prior to February 4, 1898, the authorities in Cuba had forwarded to Madrid various protests presented to them on behalf of the International Ocean Telegraph Company and the Cuba Submarine Telegraph Company against the attempts of the French Cable Company to engage in cable traffic between Cuba and points outside of Hayti. On February 4, 1898, the Madrid authorities referred the matter to the autonomous government of Cuba for determination, as being within the

jurisdiction conferred by the decree establishing that government. This reference was communicated to the governor-general of Cuba by an order of the Ministry of the Colonies, dated February 4, 1898, and numbered 260.

The matter being thus returned to the authorities in Cuba, the governor-general on March 1, 1898, referred it to the Secretary of Public Works and Communications by a communication as follows:

By the Ministry of the Colonies it is communicated to His Excellency the governor-general, dated February 4 (1898), and under No. 260, the following:

ROYAL ORDER TO HIS EXCELLENCY.

In view of the official letters from Your Excellency, Nos. 693, 696, and 1096, of 28th of June, 7th of September, and 7th of October last, forwarding with the first copy of the proceedings with occasion of petition of the representative of the International Ocean Telegraph Company and the Cuba Submarine Telegraph Company, in which he claims privileges that he believes to correspond to the said companies regarding the traffic of cablegraphic correspondence between that island, the United States, and Europe, and that he regards violated with the circulation of that correspondence by the route established by the French Company between Santiago de Cuba and Hayti, and with the second and third letters copies of the proceedings regarding the tariffs of the French cables, and touching on matters that involve no other solution but that of adhering to what is settled in the legal dispositions and existing contracts communicated of royal order by the Minister of the Colonies, I have the honor to say to Your Excellency that the proper action be taken by the insular government regarding the said matter. The papers that were attached to the said official letters are not returned, because they are only copies, and their originals must be in the corresponding office of that island. Its accomplishment being agreed to by His Excellency on February 24 last, I have the honor to refer it to Your Excellency for your knowledge and what may correspond. God save Your Excellency many years.

Habana, March 2, 1898.

JOSÉ CONGOSO.

THE SECRETARY OF PUBLIC WORKS AND COMMUNICATIONS.

Pursuant to such reference, the Secretary of Public Works and Communications for the island of Cuba, on April 1, 1898, determined the matter as follows:

[Secretaryship of Public Works and Communications of the island of Cuba.—No. 393.]

YOUR EXCELLENCY: By the royal order, No. 260, of February 4 last it is directed that by the insular government be adopted the corresponding resolution regarding the claim made by Your Excellency in behalf of the International Ocean and Cuba Submarine Cable companies, regarding the privileges corresponding to the same about the telegraphic correspondence between this island and the United States and Europe, which privileges are considered violated with the circulation of that correspondence by the route established by the French Company between Santiago de Cuba and Hayti. In the compliance of these privileges and having in consideration the legal dispositions and contracts in force: Considering that the International Ocean has a privilege granted for forty years to receive and to transmit the correspondence for the United States and Europe, and that the Cuba Submarine enjoys the same privilege to connect the northern and southern cables of this island, through which the correspondence in transit must pass; and considering also that the West India and Panama is in the enjoyment of the same advantage and for the

same time to place this island in communication with the West Indies and Panama and places in the South American continent where it should have established communication, His Excellency the Governor-General, by resolution of this date and with the concurrence of this office, has decided to resolve: That the French Cable Company from Santiago de Cuba to Hayti must keep close to its concession, confining itself to forwarding by that line the telegraphic correspondence exchanged between both countries, not being able, therefore, to accept messages but to Hayti, Santo Domingo, Curaçao, La Guaira, and Venezuela, and for all other places not reserved to the International Ocean and West India and Panama, through whose lines must be forwarded exclusively all the messages sent from this island to the United States and Europe, and those received from these places, and those passing in transit with destination to the stations belonging to the West India and Panama.

This being the result of the petition before mentioned, I forward it to Your Excellency for your knowledge and what may concern.

May God save Your Excellency many years.

Habana, April 1, 1898.

EDUARDO DOLZ.

The Secretary will recall that the juridical system of Spain permitted certain officials of the executive or administrative branch of the Government to exercise judicial powers. The determinations set forth in the foregoing decrees were made pursuant to such authority, and within the jurisdiction of Spain are entitled to the consideration given judicial decisions.

Doubtless the Secretary will desire to be informed what practice was enforced by the Spanish officials in Cuba immediately prior to the American occupation, regarding the transmission over the Government telegraph line between Santiago and Habana of messages received from or destined for points in the United States, via Haiti and over the French cable. The showing made herein as to the practice is not conclusive. In regard thereto, the Chief Signal Officer of the Army reports as follows:

The United States and Haitian Telegraph Company have claimed the right to send telegrams from Santiago to any point on the island of Cuba, provided such telegrams are sent over the land lines, and the Chief Signal Officer of the Army has been informed by the agents of said company that this right was formally decided by the Spanish authorities prior to the Spanish-American war. (Doc. 5, No. 2105.)

Mr. Thomas F. Clark, vice-president of the International Ocean Telegraph Company, in letter to the Secretary of War dated August 3, 1900, refers to the language above quoted from the report of the Chief Signal Officer of the Army, and considers that it was intended "to cover the United States traffic as well as traffic for Hayti." Mr. Clark insists that, if so intended, the statement is inaccurate. Mr. Clark also writes:

To make sure on this point, I made inquiry of our agent in Habana, who has represented the company there for more than twenty years. He replies:

"First. The Spanish Government land lines were worked between Habana and Santiago.

"Secondly. The Spanish land lines did not accept United States messages from the

French Cable Company at Santiago, as that would have been a violation of the rights of the International Ocean and Cuba Submarine Telegraph companies.

"Thirdly. The Spanish land lines did not transfer to the French Cable Company at Santiago any messages for the United States."

If considered necessary, it will probably not be difficult for the governor of Cuba to secure definite and accurate information as to such established practice.

Soon after the American occupation of Cuba was established the attention of the War Department was directed to the proposition that under the terms of the Spanish grant, the concession to the International Telegraph Company terminated on May 5, 1880.

The facts and provisions of law by which this proposition is to be tested are as follows:

The grant to the International Ocean Telegraph Company, given December 5, 1866, provided that the concession was to continue for forty years upon condition "that during the same period of time the United States Government does not deprive them of the exclusive grant allowed them." (Art. 1.)

The grant allowed by the United States Government by act of Congress approved May 5, 1866, expired by limitation on May 5, 1880. (14 Stat. L., p. 44, chap. 74.)

The condition in the Spanish grant limiting its operation to the period of time during which the grant from the United States Government continued to be exclusive, was modified by royal decree dated May 13, 1867. From said decree the following is quoted:

In view of the petition made March 2, 1867, by the representatives of the above-mentioned company, considering that there is no reason for establishing differences as regards time between permissions emanating from the same Government, \* \* \*

ARTICLE 1. The permission to land on the coasts of the island of Cuba the submarine telegraphic cables referred to by article 1 of the decree of 5th of December, 1866, will be reputed as a final grant made to the International Ocean Telegraph Company for the term of forty years, subject to the terms established in the second condition of schedule of terms for bidders in sale of said grant authorized by decree of same date, 26th February last.

ART. 2. For the fulfillment of its provisions, be it understood that the concession of decree of 5th December, 1866, is hereby modified in the sense of the foregoing article.

(*Gaceta de Madrid*, May 17, 1867.)

The "second condition" referred to is as follows:

The company will make use of the telegraphic lines during forty years, the Government making no other grants during this time for the establishment of parallel lines.

After the expiration of said term the Government will be free to accord permissions for new landings solicited, the company continuing in the enjoyment of the use of their line. For the ends of this article, parallel lines will be such that starting from Cuba and Porto Rico will have submerged cables running approximately in the same direction.

(*Gaceta de Madrid*, February 28, 1867.)

## II.

**CONSIDERATION OF THE SPANISH CONCESSIONS INVOLVED HEREIN WITH REFERENCE TO THE PRINCIPLES AND RULES OF LAW PREVAILING IN THE UNITED STATES.**

**THE CONCESSION TO THE INTERNATIONAL OCEAN TELEGRAPH COMPANY.**

If the concession of the International Ocean Telegraph Company be considered with reference to established principles and policies of the United States, and the language of the grant tested by the rules of statutory construction prevailing in our courts, I think it would appear that said concession did not create the exclusive privilege of engaging in cable traffic between the United States and Cuba. With us, in order to secure an exclusive privilege to exercise a right or authority belonging to the public, it is necessary that the grant definitely and specifically exclude all others from participation or the right to participate, for our courts construe such grants against the party asserting exclusive privilege and in favor of public rights of participation.

In this connection the attention of the Secretary of War is directed to the language of the act of Congress whereby the International Ocean Telegraph Company secured the right to attach its cable to the coast of Florida (see 14 Stat. L., p. 44, chap. 74):

That the said International Ocean Telegraph Company, incorporated under the laws of the State of New York, their successors and assigns, shall have the sole privilege for a period of fourteen years from the approval of this act to lay, construct, land, maintain, and operate telegraphic or magnetic lines or cables in and over the waters, reefs, islands, shores, and lands over which the United States have jurisdiction from the shores of the State of Florida, in the said United States, to the land of Cuba and Bahamas, either or both, and over West India Islands.

For convenient comparison the language of article 1 of the Spanish concession is again reproduced:

ARTICLE 1. The grant that on the 19th of last June was temporarily given by a royal decree to Mr. William Smith, representative of the Telegraphic International Oceanic Company, to fix in some point of the island of Cuba the end of the telegraphic submarine cable which has to start from the coast of Florida in the United States, is now given with a definite character, and for the term of forty years, for the placing of the cable or cables, which starting from the States of the Union, end in the said island of Cuba, provided that during the same period of time the United States Government does not deprive them of the exclusive grant allowed them.

If said act of Congress is accepted as an example of what language is necessary to create an exclusive privilege of the character now claimed by the International Ocean Telegraph Company, a comparison therewith shows that the Spanish grant stops with the creation of an exclusive privilege "for the placing of the cable or cables, which starting from the States of the Union end in the said island of Cuba."

The construction of said Spanish concession for which the International Ocean Telegraph Company contends gives the concession the character of a monopoly. Monopolies are not regarded with favor in the United States. The sentiment against them is sufficiently strong to affect legislation and find reflex from the courts. In some of our States the creation of monopolies is prohibited by the constitution (Maryland, North Carolina, and Tennessee), and in many instances they are prohibited by statutes, while frequent grants of authority by legislative acts require that such authority shall not be used to create a monopoly. It is not established in the United States that a monopoly *per se* is void *ab initio*. They are *mala prohibita*. In the absence of antecedent restraint monopolies of many kinds are permissible, and certain kinds are created and protected by statutes enacted for that purpose. (See patent, copyright, and trade-mark laws.) But the fact remains that, in general, monopolies are odious in the United States, and grants thereof are strictly construed against the exclusive privilege and broadly construed in favor of the general right.

Continuing the examination of this Spanish concession from the standpoint of the United States before the military occupation of Cuba, the attention of the Secretary of War is directed to the fact that by comity of nations the United States was entitled to communicate with Cuba while that island was under Spanish sovereignty. To dispose of, limit, or control this right, as though it were entirely subject to the discretion of the Crown of Spain, was to deny the right of the United States to communicate with the inhabitants of Cuba. Spain did not assume to make such denial, but, on the contrary, conceded the aforementioned right of the United States and recognized that an exclusive grant of the right to establish means of telegraphic communication between the United States and Cuba required the mutual assent of both Governments. (See Decree Jan. 27, 1889.)

In addition to the rights conceded by comity of nations, the United States during our entire history has considered and asserted that this nation has special interests and rights in and related to Cuba, of such magnitude and extent as to finally justify a demand upon the Spanish Government for the withdrawal of Spanish sovereignty from the island.

I therefore think that if said concession to the International Ocean Telegraph Company were created by an act of the Congress of the United States, instead of a decree of the Crown of Spain, a court of the United States would confine the grant to the right specifically set forth in the words used and, giving the grant of exclusive privilege a strict construction, would hold that the exclusive privilege of "placing" submarine telegraph cables could not be so construed as to prevent the Government from establishing overland telegraphic communication from one point in its territory to another and permitting such means of communication to be used as a common carrier.

## THE CONCESSION TO THE CUBA SUBMARINE TELEGRAPH COMPANY.

The language of the concession to the Cuba Submarine Telegraph Company by which the company asserts it secured the exclusive privilege of engaging in telegraphic traffic between Santiago, Batabanó, and Habana, is as follows (Art. 3, decree of December 31, 1869):

The Government will not grant to any person or private undertaking the establishment of another land or submarine line to join at Santiago de Cuba, the place of mooring of this cable, and the central telegraph of Havana, the only three points of contact which this line will have with the territory of the island, and on which only telegrams of a private nature will be transmitted, forwarded, and collected.

As construed by the Spanish ministry in the decree of January 27, 1889 (ante), the concluding words of said article 3 mean that telegrams of a private nature are to be transmitted, forwarded, and collected by this line only.

If such is the correct or binding interpretation of the language of this concession, I think a court of the United States would hold that an exclusive privilege was thereby created and conferred.

The Attorney-General has heretofore advised the Secretary of War that the Government of Spain has authority to create and confer exclusive privileges of this character in territory subject to the sovereignty of Spain. (22 Op., 516.)

At the time this concession was granted (December 31, 1869), Cuba and adjacent waters were internationally recognized as within the sovereignty and possession of Spain. Since both ends and intermediate moorings of the Cuba submarine telegraph cable were attached to territory subject to Spanish sovereignty, said cable was not international and the rights of no other nation were involved. The territory in which the Spanish Government agreed land lines should not be constructed was territory subject to the exclusive sovereignty of Spain, and in which Spain exercised the same authority respecting correspondence by telegraph that it exercised over postal affairs.

As already stated, the Attorney-General advises the Secretary of War that the rights conveyed by the Spanish concession are rights of property. Such rights differ from the right to exercise sovereign powers created by grants of authority, such as delegated authority to Spanish officials in Cuba. The rights of property continued after the sovereignty granting them was withdrawn, while the agencies for the exercise of sovereign power ceased with the termination of the authority of their principal.

## III.

In this case, as in many others from our insular possessions, the inquiry arises: Why not refer the parties interested to the courts and have the questions involved determined by the courts?

That such course would be unavailing and improper in this controversy is made apparent by recalling the act of which complaint is made and by whom such act is done and performed. The act complained of is the act of transmitting certain telegrams over the telegraph lines owned and operated by the military government of Cuba; and the actor is the military government. The grievance of which complaint is made does not result from the fact that the French Cable Company *tenders* messages to the military government for transmission over the Government lines to Habana or Batabanó; nor from a *tender* by an individual in Habana or Batabanó of a message to Santiago. The injury results from the action of the military government in *accepting* and *transmitting* said messages. The proprietor and operator of the telegraph line performing the act complained of is the military government of Cuba. The agents and instrumentalities by which the messages are transmitted are subject to the orders of the superior authorities of that government upon whom rest the responsibilities for the course pursued.

It can not be conceded that the action or discretion of the superior authorities of the military government of Cuba in respect of the use of its property or the performance of a public service, is subject to the discretion and control of the courts of that island or elsewhere.

In the printed argument filed herein on behalf of the several cable companies, resisting the application under consideration, occurs the following:

If the Secretary of War declines to make the order now applied for by the International Ocean Telegraph Company that company can at once file a bill for injunction in the courts of Cuba or in the courts of New York and obtain all the relief it is entitled to. If, on the other hand, the Secretary of War should grant the application which the International Ocean Telegraph Company makes, the four telegraph and cable companies, whose business to and from Cuba is thereby stopped, are unable to get into the courts to establish their rights and claims. They can not enjoin the Secretary of War from making or enforcing his order, neither can they enjoin the Western Union Telegraph Company or the International Ocean Telegraph Company from carrying on cable business between the United States and Cuba.

To the writer it appears manifest that both contestants are equally incapable of securing a revocation of such order as the Secretary of War shall make in this matter, by applying to the courts.

A further objection to following the course suggested in the above quotation is that the writs of injunction and mandamus are unknown to the Spanish code of civil procedure. This code has been continued in force in Cuba by the military government because its provisions were known and acceptable to the inhabitants.

It appears to the writer that the determination of the question involved does not require the exercise of judicial powers. The situation to be resolved is as follows: The military authorities of the United States in Cuba determined that the military situation required the establishment of telegraphic communication between the several



parts of the island, and thereupon constructed a system of overland telegraph lines extending to a number of cities, among others Santiago, Batabanó, and Habana. The lines being in operation, it appeared that the business of the Government was not of such volume as to fully utilize the time and capacity of the system. Thereupon it was determined to permit the passage of private messages over said lines. The transmission of private messages was an act of grace, and the military government retained the right to refuse the use of its lines for that purpose at any time it saw fit so to do.

The International Ocean Telegraph Company and the Cuba Submarine Telegraph Company now complain to the Secretary of War that by permitting private telegrams of a certain origin to be transmitted over said Government lines between certain cities or stations in Cuba the military government of the island is impairing the property rights of each of said cable companies. The investigation occasioned by these complaints is not made for the purpose of *judicially determining* the questions involved, but to afford the Secretary of War the necessary information to enable him intelligently to exercise his discretionary powers in the matter of the use of property owned by the military government of Cuba. How and by whom such property shall be used are matters to be determined by the superior authorities of the Government owning the property. Therefore, the use of said property by private persons may be denied entirely, or the property may be opened to the use of the general public as a common carrier, or the use may be restricted to certain purposes or persons. That is to say, the property is to be used in such way and under such restrictions as the competent authorities determine, subject to the laws and usages of military occupation and the stipulations of the treaty of Paris. No private party or concern has a vested *right* to use said lines.

If the Secretary of War determines that said Government lines shall not be used for the transmission of said cable messages between Santiago, Batabanó, and Habana, the effect will be that the Government lines will surrender the revenue to be derived from the service, and require the French Cable Company to utilize the cable of the Cuba Submarine Company.

#### IV.

There remain to be considered the rights of the general public and what is required *pro bono publico* of Cuba. These matters involve administrative questions and therefore are beyond the limits of discussion prescribed for the law officer of the Division of Insular Affairs.

The Attorney-General has heretofore advised the Secretary of War as follows:

I do not think that controversies as to grants and franchises derived from Spain but exercisable within the island of Cuba, or other islands derived by the United States from Spain, ought to be precipitated to a decision in the present unsettled con-

dition that prevails in those islands. It is better to preserve, in all cases of doubt and difficulty, the present status until the full restoration of the civil régime and the establishment of permanent governments, under which the rights of all can be duly and deliberately determined. (Letter to Secretary of War, June 15, 1899, 22 Op., 514, 519.)

By "present status" I understand the Attorney-General to mean the *status quo ante bellum*. If the course advised by the Attorney-General is pursued herein it will preserve to each cable company the rights secured by its concession as those rights were understood and exercised under the sovereignty from which they were acquired, and relegate the questions of what changes were effected by the intervention of the United States and the resulting war, and their permanent adjustment to the changed conditions, to the people in whose behalf the intervention was made, and enable that people, in their associated capacity, to determine said questions with reference to such governmental polity as they adopt.

For the convenient reference of the Secretary of War, there is set forth the following extract from the report hereon by Col. H. H. C. Dunwoody, Chief Signal Officer, Division of Cuba (3d indorsement, No. 2105):

In my judgment the interests of the general public, which are of more importance than the interests of a single corporation, will be better served by permitting existing conditions to continue, and leaving the International Ocean Telegraph Company to secure its rights and to collect any damages which may result from the maintenance of these conditions from the government which may be finally established in the island of Cuba.

Also the report hereon of Major-General Wood, military governor of Cuba (4th indorsement, No. 2105):

HEADQUARTERS DIVISION OF CUBA,

*Habana, September 3, 1900.*

Respectfully returned to the honorable the Secretary of War, inviting attention to the opinion herein expressed.

The military governor is of the opinion that the International Ocean Telegraph Company is entitled to certain protection and rights, and said rights and protection are violated by the use of the United States land lines for transmitting messages of the French Cable Company between Cuba and the United States, and that the United States Signal Lines should not accept United States messages for the French Cable Company at Santiago. They should not transfer to the French Cable Company at Santiago any messages for the United States. This will no doubt work hardship upon the general public in the way of an increase in the present rates of the International Ocean Telegraph Company, once they are established in the rights granted in this opinion, and in order to protect the public and business interests, a rate not exceeding the one now in force should be fixed and agreed upon by the International Ocean Telegraph Company. The French Company should, however, be allowed to transmit messages from the point of its landing in Cuba (Santiago) to any point in the interior of Cuba, provided such messages are not for transmission to the United States.

If the honorable Secretary of War is in accord with this recommendation, the necessary orders will be issued.

LEONARD WOOD,

*Major-General Commanding.*

The foregoing report, in my opinion, embraces all the matters involved essential to the determination of the controversy and the ascertainment of the course to be pursued by the military government of Cuba.

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In dealing with cases arising within the territorial jurisdiction of the military government, the Secretary of War adopts the rule that his action, whenever possible, will be confined to indicating the administrative policy or general principles by which a case is to be determined, relegating to the local authorities the matter of ascertaining the facts involved and applying the administrative policy or general principles thereto. Pursuant to this established policy the Secretary of War instructed the military governor of Cuba as follows:

The military governor of Cuba is instructed that in the matter of the use of the overland telegraph lines operated by the government of Cuba to transmit messages received from or destined for points in the United States, via Haiti and over the French cable, he is to ascertain and thereafter maintain the *status quo ante bellum*, and to reserve the final and exclusive determination of the questions involved for the consideration of the permanent government of the island.

ELIHU ROOT, *Secretary of War*.

OCTOBER 31, 1901.

The foregoing order was transmitted to the military governor of Cuba in the following communication:

OCTOBER 30, 1901.

SIR: The controversy regarding the relative and respective rights of the cable companies whose cables are landed in Cuba, and the use of the government overland telegraph lines for the transmission of cable messages to and for the French Cable Company, has been carefully investigated in the War Department, and I have listened to extended arguments thereon by the attorneys for the interested companies.

Apparently the only question now involved which the military government has jurisdiction to determine is, Does the transmission of private messages between Santiago, Habana, and elsewhere over the government telegraph lines violate rights of property conferred by the existing cable concessions granted by Spain?

The law officer, Division of Insular Affairs, War Department, has submitted a comprehensive report on the propositions involved in this controversy, wherein matters are set forth which apparently establish that the Spanish concessions to the Cuba Submarine Telegraph Company confers the exclusive privilege of transmitting *private* telegraph messages passing between any *two* of the following points in Cuba: Santiago de Cuba, Batabanó, Cienfuegos, and the central station in Habana. This exclusive privilege does not include government messages between said points nor private messages between any *one* of said points and other points not reserved to the Cuba Submarine Company. If this view is correct, it would follow that the military government of Cuba violates the terms of the concession to the Cuba Submarine Telegraph Company when it permits the government telegraph lines to be used for the transmission of private messages passing between any *two* of the *four* points above indicated.

In disposing of this matter I think it advisable to follow the ordinary procedure and confine my action to indicating the general policy or principle to be adhered to, and remit the determination of the specific questions involved to the government of the island. I therefore transmit an order herein, instructing you to ascertain, and thereafter maintain, the *status quo ante bellum*.

I inclose you a copy of the report of the law officer, Division of Insular Affairs, which I think will be of material assistance in ascertaining the previous *status* and present situation.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

Brig. Gen. LEONARD WOOD,  
*Military Governor of Cuba, Habana, Cuba.*

Subsequently the following communication was received from the military governor of Cuba:

HEADQUARTERS MILITARY GOVERNOR, ISLAND OF CUBA,  
*Habana, January 29, 1902.*

SIR: Referring to your communication of January 24, inquiring as to the action taken in the controversy regarding the French Cable Company, reference being had to letter of October 30 last from the honorable the Secretary of War, I have the honor to inform you that upon receipt of the Secretary's letter the Chief Signal Officer of the Department was directed to institute an investigation for the purpose of ascertaining the *status quo ante bellum*, as the whole matter seems to have been in a good deal of doubt. However the following order, which, it is believed, establishes the conditions formerly existing, was issued:

[“Circular No. 1.”]

“JANUARY 28, 1902.

“*To all managers of government telegraph offices, island of Cuba:*

“By the direction of the military governor no messages destined for any point in the United States, Europe, or beyond will be accepted at any government telegraph office for transmission over the lines of the French Cable Company; nor will any government telegraph office accept from the French Cable Company, or any of its offices, a message from any point in the United States, Europe, or beyond for transmission over the government telegraph lines in Cuba.

“Very respectfully,

“LEONARD WOOD, *Military Governor of Cuba.*”

Capt. C. R. EDWARDS,

*Tenth Infantry, Division of Insular Affairs, War Department, Washington, D. C.*

**IN THE MATTER OF COMPLAINT MADE BY THE OWNER OF THE BRITISH VESSEL “WILL O’ THE WISP” BECAUSE OF CERTAIN RESTRICTIONS PLACED BY THE UNITED STATES UPON TRADE WITH THE SULU ISLANDS, CONTRARY, IT IS ALLEGED, TO THE PROTOCOL OF MARCH 11, 1877, BY THE REPRESENTATIVES OF GREAT BRITAIN, GERMANY, AND SPAIN. ALSO THE DEMAND OF SAID OWNERS FOR TEN THOUSAND DOLLARS FOR DAMAGES OCCASIONED BY THE ENFORCEMENT OF SAID RESTRICTIONS.**

[Submitted October 24, 1899. Case No. 870, Division of Insular Affairs, War Department.]

#### SYNOPSIS.

1. One of the important incidents of military government is the regulation of trade with the inhabitants of the territory subject to its jurisdiction. The right so to do is well established by the laws and usages of nations.
2. When sovereignty over the Sulu Islands was transferred to the United States the treaties of the former sovereignty respecting trade with said islands ceased.

This matter has not been referred to Major-General Otis for a report on the facts. In my opinion such reference and report are unnecessary,

for the reason that the facts as claimed by the complainant are not sufficient to constitute a just cause for complaint nor to entitle complainant to damages.

The complaint is occasioned by the enforcement of the following order:

By the direction of the commander in chief, United States naval force on the Asiatic Station:

All trade with the Philippines is prohibited, except with the ports of Manila, Iloilo, Cebú, and Bakalote. Ships are hereby warned to go nowhere else in the Philippines. (See copy attached to protest, Doc. 1.)

It is claimed that this order is a violation of the terms of the protocol of March 11, 1877, and also protocol of March 7, 1885, made between Great Britain, Germany, and Spain, which, it is asserted, declare—

that British ships are absolutely free to trade in the Archipelago of Sulu without touching in the first instance at any stated point in the archipelago and that Spain would in no way obstruct the import or export of merchandise. (See protest, Doc. 1.)

On May 18, 1899, when the *Will o' the Wisp* sought to trade with the inhabitants of the Sulu Islands, that territory was subject to military government.

Birkhimer on Military Government and Martial Law (p. 204) says:

One of the most important incidents of military government is the regulation of trade with the subjugated district. The occupying state has an unquestioned right to regulate commercial intercourse with conquered territory. It may be absolutely prohibited, or permitted to be unrestricted, or such limitations may be imposed thereon as either policy or a proper attention to military measures may justify. While the victor maintains exclusive possession of the territory his title is valid. Therefore the citizens of no other nation have a right to enter it without the permission of the dominant power. Much less can they claim an unrestricted right to trade therein.

In *Fleming v. Page* (9 How., 615) the court says:

It is true that when Tampico had been subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States and to respect it as such. \* \* \* The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. (See also American Instructions to Armies in the Field, sec. 5, clause 1; Bluntschli, 1, sec. 8; Manning, p. 167.)

Upon the Sulu Islands being ceded by Spain to the United States the treaties of the former sovereignty respecting trade with said islands ceased—that is to say, the agreements made by Spain relative to trade with the inhabitants of the territory ceded do not attach to the soil or become a lien upon the territory which the new sovereignty is bound to assume or maintain.

Hall on International Law (4 ed., p. 98) says:

Thus treaties of alliance, of guaranty, or of *commerce* are not binding upon a new state formed by separation, and it is not liable for the general debt of the parent state, etc.

The same rule is applied in territory ceded to another state as where the territory separated becomes an independent state. (Id., p. 104.)

Halleck on International Law (3 ed., vol. 1, chap. 8, sec. 35) says:

But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent state or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things.

This doctrine originates in the fact that permission to foreign nations to trade with its subjects is an act of grace on the part of the sovereignty. It may be that where the sovereignty continues a change of persons or instruments by which it is administered does not change the agreement or obligation to extend the grace upon the designated conditions. But where there is a complete change, not only of sovereigns but of sovereignty, of necessity the agreement ends, for each sovereignty must exercise its grace in accordance with its own constitution, laws, and customs.

The most insistent instructor which the United States has had as to this canon of international law has been Great Britain. I shall not attempt to review the instances, but simply call attention to the controversy regarding the fishery privileges upon the coasts of Newfoundland, Nova Scotia, and Labrador, in which England insisted that the separation of a new state from an old one involves the loss, on the part of the inhabitants of the territory of the new state, of local rights within the territory remaining to the old state which had previously been enjoyed in common by the subjects of the original state. (British and Foreign Papers, vol. 7, pp. 79-97.) The controversy was ended by the treaty of 1818, in which the contention of England was conceded to be correct.

In the controversy between the United States and Great Britain with reference to protectorate exercised by the latter power over the Mosquito shore, Lord Clarendon declared that "Mexico was not considered as inheriting the obligations or rights of Spain." (De Martens, *Nouv. Rec. Gen.*, vol. 2, p. 210-216.)

In regard to Mexico, Hall on International Law says (4th ed., p. 101):

The very fact that Mexico succeeded to all the territorial rights of Spain, and consequently to full sovereignty within the territory of the Republic, shows that it could not be burdened by limitations on sovereignty to which Spain had chosen to consent. It possessed all the rights appertaining to an independent state, disencumbered from personal contracts entered into by the state from which it had severed itself.

The sovereignty of the United States in the Sulu Archipelago is not encumbered with the personal contracts entered into by the Crown of Spain regarding trade with the inhabitants of said islands.<sup>a</sup>

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<sup>a</sup>See *ante* p. 177 *et seq.*

The Secretary of War approved the views expressed in the foregoing report and advised the State Department as follows:

WAR DEPARTMENT,  
Washington, January 30, 1900.

SIR: I have the honor to acknowledge the receipt of your communication of the 18th instant, relative to the claim of the British steamer *Will-o-the-Wisp*, on account of losses sustained through the action of the United States authorities in forbidding and preventing her trading with the Sulu Islands, and beg to hand you herewith copy of the report of the law officer of the Division of Customs and Insular Affairs of the War Department thereon, whose views are concurred in by this Department.

Very respectfully,

ELIHC ROOT, *Secretary of War*.

THE SECRETARY OF STATE.

**THE PROTECTION BY THE GOVERNMENT OF CIVIL AFFAIRS IN CUBA AND THE PHILIPPINES, OF TRADE-MARKS REGISTERED PRIOR TO THE TREATY OF PARIS (1898) IN THE INTERNATIONAL REGISTRY AT THE BUREAU OF THE UNION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, BERNE, SWITZERLAND, UNDER THE INTERNATIONAL AGREEMENT CONCLUDED APRIL 14, 1891, TO WHICH SPAIN WAS A PARTY.**

[Submitted March 27, 1901. Case No. 915, Division of Insular Affairs, War Department.]

SYNOPSIS.

1. Rights of property in trade-marks, in Cuba and the Philippines, are entitled to the protection stipulated for "property of all kinds" in Articles I and VIII of the treaty of Paris, 1898.
2. Trade-marks registered in the "International Registry at the Bureau of the Union for the Protection of Industrial Property, Berne, Switzerland," prior to the treaty of Paris, 1898, are entitled to the same recognition and protection from the military governments of Cuba and the Philippines as trade-marks registered in the national registry at Madrid or in one of the provincial registries of the islands.
3. The present provisions for said recognition and protection are inadequate.

SIR: I have the honor to acknowledge the receipt of your request for a report on the following questions:

1. Are trade-marks which were registered at the International Registry, Berne, Switzerland, prior to the treaty of Paris (1898), entitled to recognition and protection in Cuba and the Philippines, without being registered in the United States?

2. Do the provisions of Circular No. 12, Division of Customs and Insular Affairs, War Department, April 11, 1899, afford the privilege and protection which the United States is bound to accord trade-marks so registered?

I have the honor to report that upon examination I am of opinion that question 1 should be answered in the affirmative and question 2 in the negative.

That the Secretary of War, in determining these questions, may be as fully advised as my examination permits, the following is submitted:

The questions examined are raised by M. Morel, Director of the Bureau of the International Union for the Protection of Industrial Property, at Berne, Switzerland, by letter addressed to the Secretary of the Department of the Interior, by whom the letter is referred to the Secretary of War, with a request for an expression of views.

By an agreement concluded at Paris, March 20, 1883, the Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Servia, and Switzerland constituted themselves into an "International Union for the Protection of Industrial Property," and established a "bureau" at Berne, Switzerland, for the promotion of the purposes of said union. The industrial property concerned was largely patents, copyrights, and trade-marks. The United States gave its adhesion to said agreement and became a member of said International Union June 11, 1887. (See Proclamation of President Cleveland.)

In 1891 there was formed within said International Union a second union or association of nations. The purpose of this second association was to provide an international registration of trade-marks. This association was separate and distinct from the first union, excepting that membership in the second association was dependent upon membership in the first association. The Government of Spain gave its adhesion to the international agreement creating this second association, but the Government of the United States did not.

The agreement concerning the international registration of trade-marks was concluded at Madrid April 14, 1891. A copy of said agreement is hereto attached.

The attention of the Secretary is directed to the provisions of Article I and Article IV thereof, which are as follows:

ARTICLE 1. The subjects or citizens of each of the contracting states may secure, in all of the other states, the protection of their trade-marks accepted at the depository in the country of origin by means of the deposit of the said marks at the international bureau at Berne, made by the intervention of the government of the said country of origin.

ART. 4. From the time of registration so made at the international bureau, the protection in each of the contracting states shall be the same as if the mark had been directly deposited therein.

Continuing the investigation it becomes necessary to ascertain whether the privileges stipulated by the Government of Spain were confined to the Spanish Peninsula or extended throughout the Spanish dependencies.

In his letter to the Secretary of the Interior, M. Morel, director of the international registry, says:

These marks had not been specially filed at Manila with the idea that international registration extended its effects to not only Spain itself, *but also to its colonies*



The order of August 14, 1873, issued by the Spanish Republic, contains the following:

\* \* \* The Government of the Republic has deemed proper to decide that every foreigner, whatever be his nationality, provided that commercial treaties have been celebrated with said nation, must, when requesting the use of a trade-mark in Spanish territory, comply with all the provisions thereof; and therefore as soon as he proves that he has obtained the ownership in his country and files in the general direction of public works, agriculture, industry and commerce, the other documents which have been stipulated, duly legalized, that the proper certificate be issued to him free of cost. \* \* \*

The use of the term "Spanish territory" indicates that the provisions of trade-mark treaties were considered by the Spanish Government as applying to all parts of the Spanish domain.

The Spanish law of August 21, 1884, regulating property rights to trade-marks, etc., in the provinces of Cuba and Porto Rico, provides as follows:

ART. 11. Foreigners residing outside of Spain shall have the rights granted them by the agreements celebrated with their respective nations.

Should there be no treaty, the law of reciprocity shall be strictly observed.

The royal order of October 26, 1888, published in the *Gaceta* of Manila, December 22, 1888, regulating the use of trade-marks in the Philippines, contains a similar provision as follows:

ART. 11. Foreigners residing outside of Spain shall have the rights granted them by the conventions celebrated with their respective nations.

Should there be no treaties, the law of reciprocity shall be strictly observed.

\* \* \* \* \*

ART. 30. As the registration of foreign marks must be made subject to the conventions which may have been celebrated with their governments, the petitions presented for the purpose shall be submitted to the decision of the Government of His Majesty.

ART. 31. There shall be a special register for foreigners not residing in Spanish possessions, which shall be kept with the formalities prescribed in article 24, and in which shall be entered, furthermore, the country where the industrial, commercial, or agricultural establishment of the owner of the mark, drawing, or model is situated, as well as the diplomatic convention establishing reciprocity.

ART. 32. Manufacturers, industrials, merchants, or agriculturists who, residing in the Peninsula or adjacent islands, or in the islands of Cuba or Porto Rico, should desire to insure in the archipelago the ownership of the marks which indicate their products or of their drawings or of their industrial models, provided that they are authorized and acknowledged, and that the person interested possesses the proper certificate or title of ownership, issued in accordance with the laws in force thereon, shall apply to the Colonial Department, attaching to their petition a legalized transcript and a duplicate drawing which represents the mark, drawing, or model belonging to them.

After the General Government has received one of the copies of the drawing or industrial model referred to in the foregoing paragraph, it shall be forwarded to the general direction of the civil administration for the proper steps, and in order that the rights of the persons interested may be respected and protected in accordance with this decree.

They may also apply directly or through a representative to the governor-general in order to insure the ownership of their marks, drawings, or industrial models.

ART. 33. The general direction of the civil administration shall enter in a special register by strict order of dates the petitions presented directly by the persons interested who reside in the Peninsula, adjacent islands, or other colonial provinces, as well as those transmitted by the Colonial Department, issuing to the persons interested who request it the proper certificate and publishing the concession in the Gazette of the Capital (Madrid), as prescribed in article 29.

ART. 34. The ownership of marks, drawings, and industrial models granted by the Interior Department shall lapse in the archipelago on the date that the General Government approves their lapse in the Peninsula.

ART. 35. Any person domiciled in the archipelago who has obtained a title of ownership for his marks, drawings, or industrial models in accordance with the provisions of this decree may have his right extended to all Spanish possessions. For this purpose he shall present a petition requesting it to the General Government, which shall forward it, together with its report, a copy of the title granted, and of the drawings which represent the mark, drawing, or industrial model, to the Colonial Department in order that the latter may forward them as the case may be to the Interior Department or to the governors-general of the other colonial provinces.<sup>a</sup>

The Spanish Government adopted a liberal policy in affording protection to both foreign and domestic trade-marks. (See international agreement concluded at Paris March 20, 1883; international agreement concluded at Madrid, April 14, 1891; royal order of December 15, 1893; law of August 12, 1884; order of August 14, 1873; law of November 20, 1850; law of July 11, 1851; law of April 11, 1858; law of September 1, 1888; law of February 12, 1889.)

The infringement of rights secured by registration of a trade-mark constituted a criminal offense punishable by fine or imprisonment. (See section 217, Penal Code of Spain; sections 277, 278, Penal Code in force in the Philippines.)

Supplementing the specific provisions of law above quoted, by consideration of such liberal policy, I feel justified in reporting that trade-marks registered at the international registry, Berne, Switzerland, subsequent to April 14, 1891, and prior to the American military occupation of the Philippines, under the provisions of the international agreement concluded at Madrid April 14, 1891, were protected in the Spanish colonies in manner and extent as were those registered under domestic laws.

Such was the condition existing when the treaty of peace between Spain and the United States was concluded. (Paris, 1898.) That treaty provides as follows:

ART. XIII. The rights of property secured by copyrights and patents acquired by Spaniards in the island of Cuba and in Porto Rico, the Philippines, and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected. \* \* \*

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<sup>a</sup>A diligent search of all means of information available at the War Department, the State Department, the United States Patent Office, the Library of Congress, and the report to the Fifty-sixth Congress of the commissioners appointed to revise the statutes relating to patents, trade and other marks (S. Doc. No. 20, 2d sess. 56th Cong.) failed to secure any definite ascertainment of this matter other than above set forth.

It will be noticed that trade-marks are not included in this article, and the rights of property which "shall continue to be respected" are expressly limited to those "acquired by Spaniards."

The United States Supreme Court says:

Property in a trade-mark, or rather in the use of a trade-mark or name, has very little analogy to that which exists in copyrights or in patents for inventions. (*Canal Company v. Clark*, 13 Wall., 311, 322.)

Section XIII of the treaty hardly supports the proposition advanced by M. Morel.

But the United States by international agreements and by domestic laws recognizes trade-marks and rights thereto as property, and protects such property by special statutes and the application of general principles. (*Upton on Trade-Marks*, 10; *Canal Co. v. Clark*, 13 Wall., 311, 322.)

Article VIII of said treaty provides as follows:

It is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds \* \* \* or of private individuals, *of whatsoever nationality such individuals may be.*

Article I, with special reference to Cuba, provides as follows:

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Apparently the provisions of these two articles are sufficiently comprehensive to include rights of property in trade-marks.

If it be true that registration of a trade-mark at the International Registry at Berne secured in Spanish territory the protection of the Spanish laws, and the United States is required by treaty stipulations to continue protection thereto in territory ceded or relinquished to the United States by Spain, it becomes necessary to consider how the protection is to be afforded.

In the United States this protection is usually afforded by a writ of injunction. To entitle the owner of a trade-mark to this writ it is not necessary that the trade-mark should be registered. It is sufficient if the applicant can establish a prior lawful use of said mark, continued for a length of time sufficient to raise a presumption that the general public have become familiar with it; and thereupon the writ is issued prohibiting infringements upon the rights of said owner, in order to prevent a fraud upon the public being perpetrated.

The writ of injunction as known and used in the United States is not known to the Spanish law. The Roman law, from whence the Spanish law is derived, had what is known as the "interdict," resembling in many respects our injunction. The principal objection to the

interdict, from the American point of view, is that it calls for the exercise of judicial powers by officers of the executive or administrative branch of the government.

The owner of a trade-mark was protected, under Spanish law, by enforcing the provisions of the penal code inflicting a penalty for infringement of said rights, and by civil action for the recovery of damages. (Article 12, Royal order, October 26, 1888. Philippines.)

To entitle the owner to the protection so afforded, it was essential that his trade-mark be duly registered. (Royal decree, November 20, 1850; Article 4, Royal order, October 26, 1888. Philippines.)

The Spanish Penal Code has been continued in force by the authorities of the military government in the territories ceded and relinquished to the United States by Spain.

The attention of the Secretary is respectfully directed to the fact that instead of affording protection to trade-marks by the means utilized under the Spanish laws the authorities of the military governments were required to comply with the requirements of the following order:

Circular No. 12.  
Division of Customs and }  
Insular Affairs.

WAR DEPARTMENT,  
Washington, April 11, 1899.

The following is published for the information and guidance of all concerned:

In territory subject to military government by the military forces of the United States owners of patents, including design patents, which have been issued or which may hereafter be issued, and owners of trade-marks, prints, and labels, duly registered in the United States Patent Office under the laws of the United States relating to the grant of patents and to the registration of trade-marks, prints, and labels, shall receive the protection accorded them in the United States under said laws; and an infringement of the rights secured by lawful issue of a patent or by registration of a trade-mark, print, or label shall subject the person or party guilty of such infringement to the liabilities created and imposed by the laws of the United States relating to said matters: *Provided*, That a duly certified copy of the patent or of the certificate of registration of the trade-mark, print, or label shall be filed in the office of the governor-general of the island wherein such protection is desired: *And provided further*, That the rights of property in patents and trade-marks secured in the islands of Cuba, Porto Rico, the Philippines, and other ceded territory to persons under the Spanish laws shall be respected in said territory the same as if such laws were in full force and effect.

G. D. MEIKLEJOHN,  
*Acting Secretary of War.*

It will be noticed that said order provides that—

\* \* \* in territory subject to military government by the military forces of the United States \* \* \* an infringement of the rights secured by lawful \* \* \* registration of a trade-mark, print, or label shall subject the person or party guilty of such infringement to the liabilities created and imposed by the laws of the United States relating to said matters.

It will serve the Secretary of War no useful purpose for the writer to discuss the proposition that while the military government of terri-

tory ceded or relinquished to the United States may provide a law for itself, the provisions of which are identical with those of a law of the United States, said military government is incapable of extending a statute of the United States beyond the territorial limits of the United States as they existed at the time the statute was enacted.

The attention of the Secretary is also directed to the fact that, as construed by the Interior Department of the United States Government, said circular No. 12 makes it "necessary for the owner of a trade-mark to register it in the Patent Office in this city before he can obtain any protection thereunder in the Philippines." (See letter from Secretary of the Interior to Secretary of War, March 8, 1901.)

The Interior Department does not include in this interpretation trade-marks registered in the islands or at Madrid prior to the American military occupation.

If the views hereinbefore set forth are accepted as correct by the Secretary of War, said circular No. 12 should be so interpreted as to afford protection to trade-marks registered at the International Registry, Berne, Switzerland, pursuant to the international agreement of April 14, 1891, and prior to the mutual exchange of ratifications of the treaty of peace between Spain and the United States.

The total number of trade-marks registered in said international registry up to October 31, 1898, was 1,645. (See report of M. Morel, director, etc., for 1898.)

That the Secretary of War may be fully advised in regard to this matter, attention is directed to the fact that the order known as "Circular No. 12, Division of Customs and Insular Affairs, War Department," was prepared in the Department of the Interior, and the construction thereof, under which its provisions have been enforced by the military governments, was originally given by the Department of the Interior and subsequently acted upon by the War Department.

The question as to what extent and in what manner the military governments would afford protection to trade-marks was first presented to the War Department in March, 1899, at which time a circular was prepared in the Division of Customs and Insular Affairs. Prior to its adoption it was referred to the Commissioner of the United States Patent Office, who submitted first certain amendments and subsequently a draft of an entire order, which was adopted by this Department and promulgated as said circular No. 12, April 11, 1899. (See letters from Commissioner of Patents dated April 1 and April 10, 1899.)

Subsequently a letter was received by the War Department from M. Morel, director, etc., in which appears the following:

2. The filing marks in these colonies: May this be operated directly in virtue of the decree of August 18, 1884, for Cuba and Porto Rico, and that of October 26, 1888, for the Philippines? Or, also, is the method of procedure indicated in said circular No. 12 the only one to which foreign proprietors have recourse?

The letter of M. Morel was referred to the Secretary of the Interior, by letter of March 17, 1900, with a request for an expression of his views. In response thereto the Secretary of the Interior transmitted a copy of a letter setting forth the views on the subject of the Commissioner of Patents, Interior Department. In said letter the Commissioner of Patents says:

If this question is understood, it asks whether trade-marks may be registered in the islands of Cuba, Porto Rico, and the Philippines, in view of the said decrees.

On December 2, 1898, the Attorney-General of the United States made a decision bearing on the status of these islands. In view of said decision this office has informed interested parties that it is necessary for owners of trade-marks to file applications for registration of their marks in this country, and that after they have been registered here they may, as provided in circular No. 12, above referred to, and Nos. 21, 34, and 38, obtain certified copies of the registration in this country and deposit such certified copies in the islands under military control and such owners will receive protection as specified in said circulars of the War Department. (See letter addressed to Secretary of Interior by Commissioner of Patents dated March 27, 1900.)

The War Department accepted this interpretation of said circular No. 12 as correct, and acted in accordance therewith.

Since in this matter the War Department sought and received the services of the Department of the Interior, and the information of the writer regarding the subject is confined to that received in making the investigation necessary to prepare this report, I naturally hesitate to offer recommendations, and would not do so were it not that the Secretary of the Interior in his letter to the Secretary of War (which occasioned this report) says he "would prefer an expression of your [the Secretary of War's] views in the matter before making any reply to the inquiries on the subject contained in Mr. Morel's letter."

I therefore submit, with deference, a recommendation that a new order regulating said matters be issued. A draft of such proposed order is hereto attached.

I take the liberty of suggesting that if said draft of such proposed order favorably impresses the Secretary of War it should also be submitted to the Secretary of the Interior for his views thereon before adoption and promulgation.

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The views set forth in the foregoing report were approved by the Secretary of War and communicated by him to the Interior Department; that Department concurred therein and on June 4, 1901, the report was communicated to the military governor of Cuba, who thereupon issued the following order (see G. O. No. 160, Hdqrs. Dept. of Cuba, series 1901):

No. 160.]

HEADQUARTERS DEPARTMENT OF CUBA,

*Habana, June 13, 1901.*

Under instructions from the Secretary of War, the military governor of Cuba directs the publication of the following order:

1. The rights of property in patents, copyrights, and trade-marks, duly acquire

in Cuba, the Isle of Pines, and the island of Guam, pursuant to the provisions of Spanish law and existing in one or all of said islands on April 11, 1899, shall continue unimpaired for the period for which they were granted, and the owner or owners thereof shall be protected and their rights therein maintained: *Provided*, That the original or a duly certified copy of the patent, or of the certificate of registration of the trade-mark or copyright, is filed in the office of the governor of the island wherein such protection is desired.

The certificates of registration of trade-marks issued prior to April 11, 1899, by a Spanish provincial registry, or the national registry of Spain at Madrid, or the international registry at the bureau of the union for the protection of industrial property, at Bern, Switzerland, shall receive such recognition and credence as were accorded them in said islands under Spanish sovereignty; and an original certificate or duly certified copy thereof shall be received and filed in the office of the governor of the island for all purposes connected with this order, without further or other certification.

2. The rights of property in patents, including design patents, granted by the United States, and in trade-marks, prints, and labels, duly registered in the United States Patent Office, and in copyrights duly registered in the office of the Librarian of Congress, shall be maintained and protected by the government of civil affairs in the islands above named: *Provided*, That a duly certified copy of the patent, or of the certificate of registration of the copyright, trade-mark, print, or label, is filed in the office of the governor of the island wherein such protection is desired.

3. An infringement of the rights protected by compliance with the provisions of this order shall subject the person, firm, association, or corporation guilty of such infringement to the civil and penal liabilities created and imposed by such of the laws of Spain relating to said matters as remain in force in said islands.

4. Such provisions of existing orders as are in conflict with this order are hereby revoked.

EDWARD CARPENTER,  
*First Lieutenant, Artillery Corps, Aid-de-Camp.*

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#### AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF TRADE-MARKS, CONCLUDED AT MADRID APRIL 14, 1891.

[Concluded at Madrid April 14, 1891, between Belgium, France, Spain, Switzerland, and Tunis.]

The undersigned plenipotentiaries of the States above enumerated, in view of article 15 of the international convention of March 20, 1883, for the protection of industrial property, have, with one accord and subject to ratification, concluded the following agreement:

##### ARTICLE 1.

The subjects or citizens of each of the contracting States may secure in all of the other States the protection of their trade-marks accepted at the depositary in the country of origin by means of the deposit of the said marks at the international bureau at Berne, made by the intervention of the Government of the said country of origin.

##### ARTICLE 2.

Are assimilated to the subjects or citizens of the contracting States, the subjects or citizens of states which have not adhered to the present agreement who fulfill the conditions of article 3 of the convention.

## ARTICLE 3.

The international bureau shall immediately register the marks deposited in accordance with article 1. It shall give notice of this registration to the contracting States. The registered marks shall be published in a supplement to the journal of the international bureau, either by means of a cut or of a description presented in the French language by the depositor.

In view of the publicity to be given to the marks so registered in the different States, each Government shall receive gratuitously from the international bureau such number of copies of said publication as it shall see fit to demand.

## ARTICLE 4.

From the time of registration so made at the international bureau, the protection in each of the contracting States shall be the same as if the mark had been directly deposited therein.

## ARTICLE 5.

In the countries where their laws so authorize, the Governments to which the international bureau shall give notice of the registration of a mark shall have power to declare that protection can not be given to such mark within their territory.

They shall exercise this right within a year from the notice provided for by article 3.

The said declaration thus made known to the international bureau shall be transmitted by it without delay to the Government of the country of origin and to the owner of the mark. The interested party shall have the same means of redress as if the mark had been deposited by him directly in the country where the protection is refused.

## ARTICLE 6.

The protection resulting from the registration at the international bureau shall continue for twenty years from the date of registration, but can not be invoked in favor of a mark which has ceased to enjoy legal protection in the country of origin.

## ARTICLE 7.

The registration can always be renewed in accordance with the provisions of articles 1 and 3.

Six months prior to the expiration of the term of protection the International Bureau shall give an official notice to the government of the country of origin and to the owner of the mark.

## ARTICLE 8.

The government of the country of origin shall fix, in its discretion, and receive for its own profit a fee, which it shall collect from the owner of the mark for which international registration is demanded.

To such fee shall be added an international fee of 100 francs, the annual proceeds of which shall, under the supervision of the International Bureau, be distributed equally between the contracting States, after deduction of the common expenses necessary to the execution of this agreement.

## ARTICLE 9.

The government of the country of origin shall notify the International Bureau of annulments, cancellations, abandonments, transfers, and other changes which occur in the right of ownership of the mark.

The International Bureau shall register these changes, shall notify the contracting Governments thereof, and shall immediately publish them in its journal.



## ARTICLE 10.

The Governments shall regulate by common consent the details pertaining to the execution of the present agreement.

## ARTICLE 11.

The States of the Union for the Protection of Industrial Property which have not taken part in the present agreement shall be admitted to adhere thereto on their application and in the form prescribed by article 16 of the convention of March 20, 1883, for the protection of the industrial property.

As soon as the International Bureau shall be informed that a state has adhered to the present agreement it shall address to the government of the state, conformably to article 3, a collective notification of marks which at that time enjoy international protection.

This notice shall of itself secure to the said marks the benefit of the foregoing provisions in the territory of the adhering state, and shall cause to run the delay of a year, during which the interested government can make the declaration provided for in article 5.

## ARTICLE 12.

The present agreement shall be ratified, and the ratifications shall be exchanged at Madrid, within a period of six months at the latest.

It shall take effect one month after the exchange of ratifications, and shall have the same force and duration as the convention of March 20, 1883.

In witness whereof the plenipotentiaries of the states above named have signed the present agreement at Madrid April 14, 1891.

## FINAL PROTOCOL.

On proceeding to the signature of the agreement concerning the international registration of trade-marks, concluded this day, the plenipotentiaries of the States which have adhered to said agreement have agreed as follows:

Doubts having arisen on the subject of the meaning of article 5, it is clearly understood that the right of refusal which that article leaves to the Governments does not affect the provisions of article 6 of the convention of March 20, 1883, and of paragraph 4 of the final protocol which accompanies it, these provisions being applicable to the marks deposited at the International Bureau as they have been and still will be to those deposited directly in all the contracting countries.

The present protocol shall have the same force and duration as the agreement of which it forms a part.

In witness whereof the undersigned plenipotentiaries have signed the present protocol at Madrid the 14th of April, 1891.

**IN RE NOTE OF THE IMPERIAL AMBASSADOR OF GERMANY AT THIS CAPITAL TO THE SECRETARY OF STATE, COMPLAINING OF THE REGULATIONS AND RESTRICTIONS OF TRADE WITH THE INHABITANTS OF THE SULU ISLANDS, IMPOSED BY THE MILITARY GOVERNMENT OF THE PHILIPPINE ARCHIPELAGO.**

ALSO

**THE CORRESPONDENCE BETWEEN THE UNITED STATES CONSUL-GENERAL AT SINGAPORE AND THE IMPERIAL CONSUL OF GERMANY AT THAT PORT, REGARDING THE CLOSING OF THE PORTS OF THE SULU ARCHIPELAGO TO FOREIGN COMMERCE, BY ORDER OF THE COMMANDER OF THE UNITED STATES MILITARY FORCES IN THE PHILIPPINE ISLANDS.**

[Submitted October 8, 1900. Case No. C-850, Division of Insular Affairs, War Department.]

#### SYNOPSIS.

1. The Imperial ambassador of Germany at this capital makes the claim that the military government of the Philippines is without authority to regulate, restrict, or prohibit trade with the inhabitants of the Sulu Islands; and in support thereof advances the following propositions: (a) The United States did not acquire sovereignty over the Sulu Archipelago by the conquest thereof, nor was sovereignty thereover confirmed unto the United States by the treaty of Paris (1898), for the reason that Spain had never acquired sovereignty in said archipelago, nor was Spanish sovereignty therein recognized and internationally established. (b) The provisions of the protocols entered into by Germany, Great Britain, and Spain, of date March 11, 1877, and March 7, 1885 (Martens, Nou. Rec., 2d series, vol. 2, p. 280; vol. 10, p. 642), constituted a grant creating a perpetual easement in favor of Germany, Great Britain, and the other powers, which is a servitude upon the Sulu Archipelago, diminishes the fee thereof, and remains attached thereto. (c) If the rights secured by Germany, Great Britain, and the other powers by said protocols are not vested by a grant, then they are rights derived from a contract between the respective sovereignties of Spain, Germany, and Great Britain, which contract was in force at the time the United States acquired sovereignty over said archipelago, and the obligations of said contract, incumbent upon Spain, passed to and became binding upon the United States.
2. If these propositions and the claims based thereon are advanced on behalf of the German Government, the controversy involves an international complication between Germany and the United States. In such matters the State Department has exclusive jurisdiction as to the interests of the United States.
3. If this claim is asserted for and on behalf of an individual or private concern and is intended to be addressed to the military government of the Philippines instead of to the Federal Government of the United States, that fact does not divest the matter of its international character, and it must be considered as not a proper subject for discussion by the officials of the military government or the War Department.
4. The military government of the Philippines and the War Department are bound to aid the State Department in controversies of this character by furnishing such knowledge and information in respect thereof as they are able to secure.

5. The regulations, restrictions, and prohibitions respecting trade in the Sulu Islands, of which complaint is made, were adopted as war measures required by the military necessities of the situation. They are not to be considered as establishing the permanent policy of the United States when the conditions of peace shall prevail in the archipelago.
6. Sovereignty over the Sulu Islands prior to the treaty of peace (1898) was vested in the Crown of Spain, and was not participated in by Germany and Great Britain.
7. The sovereignty of the United States over said islands is complete and exclusive.

SIR: I have the honor to acknowledge the receipt of your request for a report on the above-entitled matter, and in compliance therewith I have the further honor to report as follows:

The matter as now presented to this Department arises from the following state of facts:

The German consul at Singapore, acting on behalf of certain German merchants who desire to trade with the inhabitants of the Sulu Islands, requested the United States consul to inform him if such trading would be permitted by the United States authorities, and was informed that it would not be permitted.

The correspondence between the two consuls on this subject apparently ceased with the exchange of these two letters.

Subsequently the State Department forwarded to the War Department a translation of a note from the German ambassador at this capital relating to the same matter. (Doc. 6, 7, 8.)

The complaint made by the German ambassador questions the sovereignty of the United States over the islands of the Sulu Archipelago. The reference of said question by the State Department to the War Department involves the question of jurisdiction by the War Department to pass thereon.

The note of the German ambassador is as follows:

IMPERIAL GERMAN EMBASSY,  
*Washington, July 31, 1900.*

MR. SECRETARY OF STATE: The military governor of the Philippines ordered in the fall of last year that the harbors of the Sulu Archipelago remain closed to foreign commerce until the issuance of special regulations. As shown by the inquiries made of him in the matter, he held that this measure was warranted because, in his opinion, the arrangements concluded by Spain, Germany, and England in the protocols of March 11, 1877, and March 7, 1885 (printed in Martens, *Nou. Rec. Gen.*, 2d series, Vol. II, p. 280; Vol. X., p. 642), were extinct by reason of the transfer of the sovereignty over the Sulu Archipelago to the United States under the Paris treaty of peace. In the meanwhile, foreign trade has, to be sure, been again permitted to a certain extent in the Sulu Archipelago, but the existing conditions are different from those which obtained under the above-named protocols during the Spanish régime, especially in that the coastwise trade is forbidden, that the foreign trade is allowed not with all ports, but only with such as are occupied by American troops, and even then, barring some designated ports, with a permit from the American military authorities, and, finally, that in the open ports foreign commerce is subjected to differential customs treatment.

The restraint thus imposed upon German trade has been the cause of complaints from the firm Behn, Myer & Co., of Singapore, which had previously built up quite

a trade with the Sulu Archipelago. The Norddeutscher Lloyd has likewise petitioned in behalf of German commercial and shipping interests that the necessary steps be taken to restore previous conditions.

The preponderance of opinion among leading expounders of international law is to the effect that agreements between States which have merely a local application are not affected by a change of sovereignty over the country to which they apply on this one ground. General Otis's standpoint on the present question seems to be untenable. But apart from this consideration, the circumstances under which the protocols of 1877 and 1885 were concluded leave no doubt that their continuance under the new American rule would be but consonant with the principles of equity and international law. The negotiations which led to the conclusion of both agreements clearly show that, notwithstanding her treaty with the Sultan of Sulu, Spain did not acquire sovereignty over the archipelago, or, in any event, that such sovereignty was not recognized and internationally established. The Imperial Government jointly with England have therefore lodged with the Spanish Government a reservation against any detriment to our flag and people worked by actual assumption of such unsanctioned sovereignty. Spain was then constrained to acknowledge in a note addressed to the English representative at Madrid, under date of April 15, 1876, "that the relations which may exist between Spain and Sulu do not give a right to either State to prohibit or interfere with the direct traffic of British subjects or other foreigners with the ports of the said archipelago, which traffic ought to be and shall be respected in accordance with the principles of international maritime law." The sovereignty of Spain over the Sulu Archipelago is recognized *de facto* in the first protocol and *de jure* in the second, only because Spain bound herself not to use her authority to the detriment of our commercial interests therein. Recognition is, in the intent of the protocols, joined to the proviso that our navigation and trade in the Sulu Archipelago shall remain free from restriction and molestation, and especially so from any differential treatment. There was thus laid on the Spanish sovereignty over the Sulu Archipelago a certain limitation that has not been thrust aside by the transfer of the sovereignty to a lawful successor to Spain.

The English Government has also taken the same standpoint in the matter, for the government of the Straits Settlements colony has by its communication to the American consul-general at Singapore, printed at pages 1332-1333 of the Government Gazette of March 25 of this year (herewith inclosed with a request that it be returned), entered its protest against the United States exercising in the Sulu Archipelago any rights more extensive than those which appertained to Spain.

I have the honor to draw Your Excellency's attention to this matter, and I have no doubt that the Government of the United States will not refuse to acknowledge the rights secured to us by the respective protocols. I venture, moreover, to point out that the position of the American government of the Sulu Archipelago is in manifest contradiction of the declarations made in writing by the American Commissioners of the Peace Conference in Paris ("being the policy of the United States to maintain in the Philippines an open door to the world's commerce"), printed at pages 210, 218 of the American Congressional document, as well as of the principle of the "open door" proclaimed by the Government of the United States concerning Eastern Asia.

Awaiting your kind answer, I avail myself of this opportunity to renew to Your Excellency the assurance of my distinguished high regard.

HOLLEBEN.

(See Doc. No. 7.)

If I rightly understand the note of the Imperial German ambassador, he therein advances three propositions:

1. The United States did not acquire sovereignty over the Sulu Archipelago by the conquest thereof, nor was sovereignty thereover

confirmed unto the United States by the treaty of Paris (1898), for the reason that Spain had never acquired sovereignty in said archipelago, nor was Spanish sovereignty therein recognized and internationally established.

2. The provisions of the protocols entered into by Germany, Great Britain, and Spain, of date March 11, 1877, and March 7, 1885 (Martens; *Nou. Rec.*, 2d series, vol. 2, p. 280; vol. 10, p. 642), constituted a grant creating a perpetual easement in favor of Germany, Great Britain, and the other powers, which is a servitude upon the Sulu Archipelago, diminishes the fee thereof, and remains attached thereto.

3. If the rights secured by Germany, Great Britain, and the other powers by said protocols are not vested by a grant, then they are rights derived from a contract between the respective sovereignties of Spain, Germany, and Great Britain, which contract was in force at the time the United States acquired sovereignty over said archipelago, and the obligations of said contract incumbent upon Spain passed to and became binding upon the United States.

If these claims are advanced for and on behalf of the sovereignty of Germany and are addressed to the sovereignty of the United States, then the controversy is between said sovereignties and relates to their respective sovereign rights. Such matters pertain to the foreign relations of the United States and are dealt with by the Federal Government, acting through that Department of the executive branch to which our foreign relations are committed. If this be the situation, then, in the opinion of the writer, the questions are outside the jurisdiction of the War Department.

If these claims are advanced on behalf of an individual or a private interest, for the purpose of sustaining the exercise of an individual or private right in territory subject to the jurisdiction of the military government, which said exercise relates to the administration of government in said territory, a different situation is presented, and, in the opinion of the writer, the military government might then possess jurisdiction.

The Acting Secretary of State, in his letter to the Secretary of War, states the purpose of the reference to be "for your consideration and examination of the question raised." (Doc. No. 6.)

It is to be noted that said expression of purpose does not include "determination."

The attention of the Secretary of War is directed to this omission as being an indication that the State Department entertains the opinion that the question involved in the note of the German ambassador is not within the jurisdiction of the War Department in the sense that it is to be determined thereby.

In closing his letter the Acting Secretary says:

I shall be glad to transmit to the embassy your reply to its expression of the hope that the military orders of which complaint is made will be rescinded. (Doc. No. 6.)

Examination of the questions involved is therefore made, that the Secretary may determine what he will include in a reply which is to be transmitted to the German embassy.

Apparently the first question presented by this communication is, In what capacity does the German ambassador make complaint? Is the complaint to be considered as that of the Imperial Government of Germany? Or, is it to be considered as the complaint of individual shippers? I consider it important to have a correct understanding as to who makes the complaint. The challenge of the sovereignty of the United States therein contained, if made by an individual, differs materially from such a challenge made by the Imperial Government of Germany. It is doubtful if the United States would feel called upon to discuss the rights of sovereignty in the Sulu Islands, or the limitations thereon, with an individual of a foreign state, even through an ambassador as an intermediary. But when the question is presented by the *government* of a foreign state, the discussion is not to be avoided.

In the letter of Hon. William McKinley, accepting the nomination of the Republican national convention of 1900 for President of the United States, appears the following:

Our title is good. Our peace commissioners believed they were receiving a good title when they concluded the treaty. The Executive believed it was a good title when he submitted it to the Senate of the United States for its ratification. The Senate believed it was a good title when they gave it their constitutional assent, and the Congress seems not to have doubted its completeness when they appropriated \$20,000,000 provided by the treaty.

\* \* \* \* \*

*It is worthy of note that no one outside of the United States disputes the fullness and integrity of the cession.*

The note of the German ambassador does not state that he has been instructed by his Government to present the complaint or raise the question involved. Presumably, however, he would not act in such a matter upon his own initiative.

The Acting Secretary of State, in transmitting the note of the German ambassador, refers to said note as one "in which he protests on behalf of the commercial interests of his country."

If we consider this complaint as made by the Imperial Government of Germany, the question arises: To whom is this complaint addressed? Is it not to the Federal Government of the United States? The controversy then stands thus: The Imperial Government of Germany complains to the Federal Government of the United States that the military government of the Philippine Islands, a government dependent upon the Federal Government of the United States, is persisting in action not warranted by the rights and powers of the United States in that territory and in violation of rights possessed by the Imperial Government of Germany in that territory. Such controversy involves the foreign relations of the Federal Government of the United States. If so, it does not seem proper that the military government of the Philippines should attempt to handle and dispose of such questions.

Even if the matter is presented to the President, he will act thereon as the Chief Executive of the United States and not as the head of the military government of the Philippines; for the important question is, What rights were secured to the United States by the conquest of the Philippines in the war with Spain and confirmed by the treaty of Paris?

Sovereignty in the Philippines was *acquired* by the United States and now *belongs* to the United States. It is being *exercised* by the military government of the islands. The reference from the State Department presents the inquiry, Shall such exercise extend to the determination of questions involving the foreign relations of the United States arising in said territory? To state the question in another form, Shall foreign States presenting questions regarding the foreign relations of the United States, arising out of the acquisition of the Philippines, be referred to the military government of the islands?

Primarily the question raised by the note of the German ambassador is, Was Spanish sovereignty in the Sulu Islands limited, and is the sovereignty of the United States likewise limited therein? Secondly the question arises, Does such limitation, if it exists, continue in territory affected by an armed insurrection? These are questions of grave importance to the sovereignty of the United States and appear, to my mind, as necessarily to be dealt with by the Federal Government. To permit the military government to determine them for the United States would, seemingly, reverse the relationship now borne by each to the other. I do not wish to be understood as reporting that the military government of the Philippines is without possible authority or warrant to determine these questions. That government is exercising sovereignty in the territory subject to its jurisdiction. I am seeking to direct attention to what seems an extension of such exercise beyond the limits heretofore observed. The line of demarcation appears plain to me. It is the line that divides the individual citizen of a foreign government from the State or Government. To illustrate: The military government is now permitted to impose tariffs on goods brought into its jurisdiction; but should it also be permitted to enter into a treaty with a foreign State regulating trade between such foreign State and the Philippines? Tariff schedules, rates, and regulations deal with private property and individual rights, and pertain to the local administration. Trade treaties deal with the rights of nations and pertain to the broad field of international relations.

The military government is admitted to have authority to give a French navigation company the right to erect a wharf in Manila Harbor, but should it be admitted to possess the authority to give the French Government the right to erect a fort therein?

In short, should the Military Government of the Philippines be considered as authorized to sustain foreign relations independent of the Federal Government of the United States?

In the instance under consideration, if the German Government asserts the right of unrestricted trade in the Sulu Islands as a right belonging to its sovereignty, the controversy rises to the dignity of international relations sustained by the sovereignty of the United States with the sovereignty of Germany, and addresses itself to the Federal Government, and should be dealt with by that branch of the Federal Government to which our foreign relations are committed.

If this view is correct, it would seem that the service incumbent upon the War Department is to furnish all facts and information relating to the question to the State Department for its use in conducting the negotiation.

The United States being engaged in suppressing an armed insurrection in a portion of the Philippine Archipelago of easy access from the Sulu Islands, must of necessity consider any question affecting the military situation as paramount to all questions of personal right possessed by an individual or a nation. If there exists a military necessity for closing the ports of the Sulu Islands, or any of them, to commerce, it is incumbent upon the United States diplomatic corps as well as the army corps to provide for such necessity.

If the claim now advanced, supposedly in behalf of the Imperial Government of Germany, be well founded, it may be advisable to invoke the comity of nations by requesting Germany to forego urging said complaint at this juncture. An appeal to the *comity* of nations made by a war department or a military government would be incongruous, at least.

Whether or not there exists a military necessity for maintaining the existing regulations of trade with the Sulu Islands is a matter to be determined by the Secretary of War, upon his knowledge of existing conditions, and is outside of the purview of this report.

For the convenient use of the Secretary of War the following facts are set forth:

The ports of the Sulu Archipelago, with others of the Philippine Islands, excepting Manila, Iloilo, Cebú, and Bacolod, were closed to foreign commerce by the following order issued by Admiral Dewey in May, 1899:

By the direction of the commander in chief United States naval force on the Asiatic Station: All trade with the Philippines is prohibited, except within the ports of Manila, Iloilo, Cebú, and Bacolod. Ships are hereby warned to go nowhere else in the Philippines.

The attention of the Secretary is also invited to the statement of facts contained in the following copy of a communication from Rear Admiral George C. Remey, commander in chief, United States naval force on Asiatic Station, addressed to the Secretary of the Navy:

OFFICE OF THE COMMANDER IN CHIEF,  
UNITED STATES NAVAL FORCE ON ASIATIC STATION, FLAGSHIP BROOKLYN,

*Cavite, P. I., June 14, 1900.*

SIR: Referring to the Department's telegram of the 12th instant, inquiring "Did Admiral, about May, 1899, prohibit trade in the Philippines except with ports of



Manila, Iloilo, Cebú, and Bacolod? \* \* \* I have the honor to amplify here my telegraphic reply of the 13th instant, which was:

"Files show that Admiral in May, ninety-nine, forbade all trade not in American possession, especially in the islands Samar, Leyte, and Cebú. Vessels found in insurgent ports with regular clearances previously granted by American authorities, ordered to cease loading or discharging and depart immediately."

2. Quoting from the papers on file, April 24, 1899, the commander in chief wrote to the military governor:

"\* \* \* I am now trying to prevent all supplies reaching the insurgents from Manila, and have several ships and boats engaged breaking up that trade.

"I hope that no ships are being cleared from this port for ports in the south not in our possession, as all the information makes it conclusive to my mind that they are an aid to the insurgents both in supplies and information. I intend to do everything in my power to break up this trade." \* \* \*

And on May 7, 1899:

"\* \* \* I must again remind you of the damage done to our cause by the captains of the ports of Iloilo and Cebú clearing vessels for ports in the possession of the insurgents. The captains of the vessels on patrol duty are constantly bringing to my attention the difficulty of stopping traffic between insurgent ports while this practice continues.

"If we are to see the end of this struggle during our lifetimes, I can not urge too strongly that orders be given to clear no vessels except between ports in our possession, as I am convinced that nearly every one of the vessels engaged in trade with insurgent ports is carrying aid and comfort to the enemy.

"\* \* \* In the meantime I shall continue to do everything in my power to break up all communication between the insurgents by water." \* \* \*

3. May 9 the commander in chief telegraphed to the *Castine* at Iloilo:

"Return to Samar and prevent all trade."

And May 14:

"Congratulations on your good work. Extend it to Leyte and Cebú. Military governor has given orders not to clear vessels to any port not in our possession. Turn prizes and prisoners over to Sperry. The prizes should be secured in the river. Let the crew go."

4. May 17 the commanding officer of the *Yorktown* telegraphed the commander in chief, evidently referring to the telegrams just quoted:

"I understand from your telegrams to Very that all trade is to be prevented with ports in Samar, Leyte, and Cebú not in our possession, and that vessels which may be found in such ports with regular clearances previously granted by our authorities are to be ordered to cease loading or discharging and depart. Do these instructions extend to all Philippine ports not in our possession, and are they to be given to cruisers calling here?"

His understanding of the commander in chief's orders was confirmed the same day as follows:

"Sperry, Iloilo. Your interpretation of orders regarding shipping is correct. Give orders to other vessels. *Charleston* will leave to-morrow or next day for Iloilo.

(Sig.) DEWEY."

And thereupon the commanding officer of the *Yorktown*, as senior officer present at Iloilo, issued the following instructions, dated May 17, 1899:

"(1) In accordance with telegraphic directions of the commander in chief, dated May 17, 1899, the commanding officers of vessels will be governed by the following instructions:

"(2) All trade with Philippine ports not in the possession of the United States authorities is to be prevented, particularly with such ports in the islands of Samar, Leyte, and Cebú.

"(3) Should any vessels be found in ports which are in the possession of the insurgents with regular clearances heretofore granted by the United States authorities they will be ordered to cease loading or discharging immediately and depart."

5. The foregoing extracts appear to be the most pertinent of all matter on file. A telegram of May 18 from the commander in chief to the commanding officer of the *Yorktown* may be included:

"Vessels allowed to clear for ports in our possession; commanding officers use discretion."

As also part of a letter, dated May 26, from Captain Barker, as commander in chief on the station, to the commanding officer of the *Princeton*:

"\* \* \* 2. Your observations upon the desirability of keeping up a strict blockade expresses exactly my own views, and Admiral Dewey was of the same mind.

"3. Orders to enforce a strict blockade of ports in possession of the insurgents were given some time ago."

A number of papers in the files overhauled in the search for the information here furnished indicate that commanding officers often acted under oral instructions only, of which there is no record here.

Very respectfully,

GEO. C. REMEX,

*Rear-Admiral, United States Navy, Commander in Chief.*

The SECRETARY OF THE NAVY,

*Navy Department, Washington, D. C. (Bureau of Navigation).*

The order issued by Admiral Dewey has been continued in force by the Commander in Chief of the Army and Navy of the United States, presumably from continued necessity, and certainly by the exercise of powers not subject to question by the subordinate departments of this Government.

Certain modifications of this order have been made authorizing coastwise trade with certain ports of the islands. Presumably, these orders grant the largest liberty of trade permitted by existing military necessities. Said orders are as follows:

GENERAL ORDERS, }  
No. 30. }

OFFICE OF THE UNITED STATES MILITARY

GOVERNOR IN THE PHILIPPINE ISLANDS,

*Manila, P. I., March 10, 1900.*

For the immediate relief of the native inhabitants of the Joló Archipelago, who have heretofore been granted free trade privileges and who it is reported have suffered materially during the past year from loss of cattle and a consequent minimum supply of native food products, the prescribed customs dues on the importation of cattle, articles of food, petroleum, tobacco, matches, clothing and articles for use in the manufacture of the same, sewing machines, agricultural implements and machinery for use in preparing products of the soil for home consumption or export, are suspended until December 31 next, provided such articles of consumption, trade, or merchandise are owned, imported, and handled by the native inhabitants of the islands, and that all business connected therewith in the islands is conducted by and between these inhabitants. The Moro inhabitants of the islands will also be permitted during the present year to export free of duty all products of the soil—they being solely concerned in person and interest in handling and shipping the same.

The present existing provisional customs tariff and regulations will remain in force in that archipelago in all cases of importation or exportation in which other than natives are in any wise interested, whether as principals or agents.

By command of Major-General Otis:

M. BARBER,

*Assistant Adjutant-General.*

GENERAL ORDERS, }  
No. 73. }

OFFICE OF THE UNITED STATES MILITARY  
GOVERNOR IN THE PHILIPPINE ISLANDS,  
*Manila, P. I., December 26, 1899.*

I. Trade and commercial intercourse with the ports of the Sulu Archipelago, with those of Zamboanga, Cotabato, and Davao, of the island of Mindanao, and with the island of Basilan will be re-established upon the receipt of this order at the various ports affected, the same to be prosecuted under the customs regulations adopted and prevailing in other sections of the Philippines.

The ports of Zamboanga, Mindanao, Joló, island of Joló, and Siassi, island of Siassi, are declared to be open ports for the time being and will receive the necessary equipment. The commanding general of the district of Mindanao and Joló will designate and appoint collectors and inspectors of customs, subject to the approval of this office, and will cause to be detailed such assistants as may be necessary. At ports where the services of captains of ports are demanded the same officers will perform the duties of both collectors of customs and port captains. The treasurer of the islands, the collectors of customs, and the captain of the port of Manila will supply the various officers appointed with all orders, circulars, books, blanks, and instructions necessary to guide them in the performance of their duties.

II. The commanding general of the district of Mindanao and Joló will appoint, subject to the approval of this office, collectors of internal revenue for the various more important towns and districts within his command. The collector of internal revenue at Manila will furnish upon application all books, blanks, circulars, orders and instructions, and blank cédulas required by them to execute the labors of their office.

By command of Major-General Otis:

THOMAS H. BARRY,  
*Assistant Adjutant-General.*

The Sulu Islands are now subject to military occupation, and the affairs of civil government are conducted by a military government. Regarding the authority of a military government to regulate trade with the inhabitants of territory subject to its jurisdiction, Birkhimer says (Military Government and Martial Law, p. 204):

One of the most important incidents of military government is the regulation of trade with the subjugated district. The occupying state has an unquestioned right to regulate commercial intercourse with conquered territory. It may be absolutely prohibited, or permitted to be unrestricted, or such limitations may be imposed thereon as either policy or a proper attention to military measures may justify. While the victor maintains exclusive possession of the territory his title is valid. Therefore the citizens of no other nation have a right to enter it without the permission of the dominant power. Much less can they claim an unrestricted right to trade therein.

In *Fleming v. Page*, 9 How., 615, the United States Supreme Court say:

It is true that, when Tampico had been subjugated, other nations were bound to regard the country, while our possessions continued, as the territory of the United States, and to respect it as such. \* \* \* The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them.

(See also, American Instructions to Armies in the Field, sec. 5, clause 1; Bluntschli 1, sec. 8; Manning, p. 167.)

In passing upon the question of military necessity, the Secretary of War will probably desire to know to what extent, if any, adequate provision for such a necessity would infringe upon the actual rights of Germany under the protocols to which the ambassador refers.

The attention of the Secretary is respectfully directed to declaration 1 of the later of these protocols, dated March 7, 1885:

1. The Governments of Germany and of Great Britain recognize the sovereignty of Spain over the places actually occupied, as well as those which are not yet so, of the Sulu Archipelago (Joló), whereof the limits are established by article 2.

The consideration of this recognition of sovereignty is set forth in declaration 3 of said protocol as follows:

The Spanish Government abandons, in favor of or toward the British Government, all pretenses of sovereignty on the territories of the continent of Borneo which belong to or have belonged in the past to the Sultan of Sulu (Joló), including the islands of Balambangan, Banguey, and Malawai, as well as all those islands included in a superficies of three maritime leagues alongside the coast, and make part of the territories administered by the British North Borneo Company.

The question of sovereignty being thus determined, Spain, in the exercise of sovereignty over said territory, gave the following "pledge" (declaration 4):

The Spanish Government pledge themselves to enforce in the archipelago of Sulu (Joló) the stipulations contained in the articles 1, 2, 3 of the protocol signed at Madrid on the 11th of March, 1877.

By said article 1 of declaration 4, Spain granted the right of trade and direct traffic with the archipelago, and the right of fishing in the waters thereof, to the "vessels of the subjects of Great Britain and Germany and of the other powers \* \* \* *without prejudice to the rights recognized to Spain by the present protocol.*"

The "rights" recognized by said protocol were those constituting sovereignty. The privileges of trade and fishing so stipulated were to be exercised "according to the following declarations." By article 2 of declaration 4 it was stipulated that in future the vessels or the subjects of Great Britain, Germany, and other powers might engage in trade "from one point to another point of the said archipelago, or from that archipelago to any other part of the world," without calling, before or after, at some designated point, or paying any taxes or securing permission to trade from the authorities of Spain.

It was stipulated in said article—

that the Spanish authorities will not interfere in any manner nor under any pretext with the free importation and exportation of merchandise of every description without exception, reserving the points occupied and in the limits of declaration 3. (Declaration 3 relates to Borneo and adjacent islands, to which Spain released its claims of sovereignty.)

It was further stipulated in said article 2 of declaration 4—

*that on all points not actually occupied by Spain, neither the vessels, nor the subjects hereabove mentioned, nor the goods, will be subject to taxes, duties, or payment of any sort, nor will they be subject to regulations, sanitary or otherwise.*

Article 3 of declaration 4 provides as follows:

3. *In the places occupied by Spain in the archipelago of Sulu (Joló) the Spanish Government will be at liberty to establish taxes, sanitary or other regulations during the time of the actual occupation of the said places. But, on the other side, Spain pledges herself to keep the establishments and the staff necessary according to the wants of trade and for the carrying out of the regulations.*

It is nevertheless expressly understood, and the Spanish Government being on its part determined to not introduce restrictive regulations to the occupied places, takes willingly the pledge that no taxation, no duties, will be introduced in these occupied places *which will be heavier than those fixed by the Spanish tariff or by treaties or conventions between Spain and other powers.*

The Spanish Government will not put in force exceptional legislation toward the trade or the subjects of Great Britain, Germany, or any other power.

In case Spain should actually occupy other places in the archipelago of Sulu in maintaining administration and staff necessary to the wants of trade, the Governments of Great Britain and Germany will not raise objections to the application of the same regulations stipulated for the places actually occupied.

The article further provides that notice of the occupation of additional points, and the enforcement of tariff duties and regulations therein, should be given to the Governments of Great Britain and Germany, and also published in the newspapers of Madrid and Manila for the information of the public and trade.

After reading this protocol it is difficult to agree with the statement made by the German ambassador that —

both agreements clearly show that notwithstanding her treaty with the Sultan of Sulu Spain did not acquire sovereignty over the archipelago, or in any event that such sovereignty was not recognized and internationally established. (Doc. 7, pp. 2-3.)

It is also difficult to consider the stipulations of said declaration 4 as creating or recognizing limitations on the sovereignty of Spain in the Sulu archipelago of other or different character than arise from ordinary treaties regarding commerce.

Respecting such treaties, the attention of the Secretary is invited to the following.

Hall on International Law says (4 ed., sec. 27, p. 98):

Thus treaties of alliance, of guaranty, or of commerce are not binding upon a new state formed by separation.

The same rule is applied in territory ceded to another state as where the territory separated becomes an independent state. (Id. p. 104.)

Halleck on International Law says (3d ed., vol. 1, chap. 8, sec. 35):

But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things.

This doctrine originates in the fact that permission to foreign nations to trade with its subjects is an act of grace on the part of the sovereignty.

In the controversy between the United States and Great Britain with reference to protectorate exercised by the latter power over the Mosquito shore, Lord Clarendon declared that "Mexico was not considered as inheriting the obligations or rights of Spain." (De Martens. *Nouv. Rec. Gen.*, vol. 2, p. 210-6.)

In regard to Mexico, Hall on International Law says (4th ed., p. 101):

The very fact that Mexico succeeded to all the territorial rights of Spain, and consequently to full sovereignty within the territory of the Republic, shows that it could not be burdened by limitations on sovereignty to which Spain had chosen to consent. It possessed all the rights appertaining to an independent state, disencumbered from personal contracts entered into by the State from which it had severed itself.

From the authorities above quoted, it seems that the rule is, that where the sovereignty continues, a change of persons or instruments administering the sovereignty does not change the agreement or obligation to extend the grace upon the designated conditions. But where there is a complete change not only of officials but of sovereignty, of necessity the agreement ends, for each sovereignty must exercise its grace in accordance with its own ideas, institutions, and customs.

In his opinion as to the claim of the Manila Railway Company for the payment of subventions by the United States, under concessions granted by Spain, delivered to the Secretary of War, July 26, 1900, the Attorney-General held that the personal obligations of Spain incurred in the Philippines did not pass with the sovereignty, although, where the obligation was incurred for the continuing use and benefit of a province, a general equitable obligation rested upon such province to provide a fair compensation for such continued benefit.

In support of the proposition that the personal obligations of Spain did not pass with the sovereignty, the Attorney-General says (pp. 6, 7):

Spain is regarded by the law of nations as having a personality of her own distinct from that of the power which has succeeded her in control of the ceded territory, and I am not aware of any authority for saying that such personal obligations, either on the part of the Government of Spain or the other contracting parties, become binding as contractual obligations upon a government which made no such promises, or upon the individual toward a government to which he made no such promises. Hall says (*International Law*, sec. 27):

"With rights which have been acquired and obligations which have been contracted by the old state as personal rights and obligations the new state has nothing to do. \* \* \* The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted. They may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account."

Discussing whether such obligations pass with the sovereignty by operation of international law, the Attorney-General says (pp. 8, 9):

Nor should we, in inquiring whether the nations have consented to a rule of law to the effect that contracts made by the old sovereignty for local and imperial objects shall be obligatory as such upon the new sovereignty, forget the extraordinary effects

which must flow from such a law. What is there that may not be contracted for? What imaginable stipulations may not be made? To agree in a treaty to be bound by actual known contracts and to assent to a law about contracts in general are two different things. Could nations commit themselves to anything more embarrassing and unsafe than a legal obligation to carry out specifically any promises whatsoever that may be made by others in any contracts for imperial and local objects? It seems to me not, and that whoever asserts that nations have by common consent established such a law must furnish abundant and indisputable authority, whereas, as Hall says (sec. 217), this subject "is one upon which writers on international law are generally unsatisfactory."

In discussing the kind and character of obligations which do pass with sovereignty, the Attorney-General says (p. 9):

Servitudes or easements, completely granted or established upon the ceded territory for the benefit of a foreign nation, have been supposed to diminish by so much the title of the owner of the province, so that when he cedes it he cedes it subject to the servitudes. On the other hand, it may be that the owner of the province may acquire from a foreign power a servitude over foreign territory for the benefit of the province, in such a way that it would become appendent or appurtenant to the province and go with it into whosoever hands the province might be transferred. This seems to be the meaning of Hall (International Law, 4th ed., p. 98) in speaking of the navigation and regulation of a river. In such a case the obligation runs with the land, and may be regarded as other than a mere personal obligation.

This suggests the inquiry: Did the stipulations regarding trade and fishing in the Sulu Archipelago create a perpetual easement in favor of the ships and subjects of Great Britain, Germany, and the other powers which was a servitude upon the Sulu Islands, creating an obligation which passed with the sovereignty thereof?

With regard to such inquiry the attention of the Secretary is directed to the "fishery dispute" between the United States and Great Britain. The definitive treaty of peace between Great Britain and the United States (1783) contained the following (art. 3):

It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same remain unsettled, but so soon as the same or either of them shall be settled it shall not be lawful for the said fishermen to dry or cure fish at such settlements without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground. (Treaties and Conventions of the United States, p. 377.)

At the conclusion of the war of 1812 a dispute arose as to said article. Great Britain contended that the provisions of said article constituted a *regulation*, and being such were abrogated by the war. The United States contended that the provisions of said article constituted a *grant*

(easement or servitude), the enjoyment of which was merely suspended by the war. The United States further contended that said grant was a recognition and confirmation of a right possessed by its inhabitants prior to the treaty. The right to fish in said localities had been enjoyed in common by all the inhabitants of British possessions in North America as a right attached to the territory, which right continued attached to the territory after the acquisition of independence by that portion of the territory which became the United States.

The United States asserted the right to a common enjoyment by two states, after separation, of property, irrespectively of its location, which had previously been enjoyed in common by the subjects of the original state; and denied that the separation of a new state from an old one involved the loss, by the inhabitants of the new state, of common rights of property located in the territory remaining under the old sovereignty.

Great Britain insisted—

That the claim of an independent state to occupy and use at its discretion any part of the territory of another without compensation or corresponding indulgence can not rest on any other foundation than conventional stipulation. (British and Foreign State Papers, vol. 7, pp. 79-97.)

At the end of a long-continued controversy, the United States abandoned its position, and by the treaty of 1818 accepted said rights of fishing as being acquired by *contract* (art. 1). (Treaties and Conventions of the United States, p. 415.)

Mr. Dana, the agent for the United States, before the Halifax Fishery Commission in 1878, interpreted said treaty (1818) as follows:

The meaning of the treaty is, that having claimed the right of fishing as a right inherent in us, we no longer claimed it as a right which can not be taken away from us but at the point of the bayonet. (Parl. Papers, North America, No. 1, 1878, p. 183.)

The position taken by the United States in this controversy is referred to in Hall's International Law (p. 100) as "the indefensible American pretension."

Continuing the investigation, let us assume that the obligations resting upon Spain created or recognized by the protocol of March 7, 1885, passed to the United States by virtue of acquiring sovereignty in the Philippines. It must then be considered that an armed insurrection against the sovereignty of the United States exists in territory adjacent to the Sulu Islands. This insurrection involves not alone the sovereignty of the United States, but also the peace of the world and the safety and welfare of the foreign residents and interests of the entire archipelago.

To suppress this insurrection the United States is conducting military operations of such extent and character as to constitute war. While so engaged is it possible that its military operations are so ham-



pered by prior trade interests that it can not adequately deal with the military necessities which may arise? Such is not the customary usage of war and nations. The trade treaties of the United States, then existing, did not make it unlawful for the Federal Government to blockade the ports of the rebellious States during our civil war. Nor did the trade treaties of either Germany or France, nor both together, render it unlawful for the military forces of Germany to complete and maintain the military environment of Paris during the Franco-Prussian war.

Trade treaties relate to the conditions of peace and, like the laws of peace, are suspended in the presence of war.

In concluding his note to the Secretary of State the German Ambassador says:

I venture, moreover, to point out that the position of the American government of the Sulu Archipelago is in manifest contradiction of the declarations made in writing by the American commissioners at the peace conference in Paris (being the policy of the United States to maintain in the Philippines an open door to the world's commerce), printed at pages 210 and 218 of the American Congressional document, as well as the principle of the "open door" proclaimed by the Government of the United States concerning eastern Asia.

The declarations of the American commissioners referred to are as follows:

And it being the policy of the United States to maintain in the Philippines an open door to the world's commerce, the American commissioners are prepared to insert in the treaty now in contemplation a stipulation to the effect that for a term of years Spanish ships and merchandise shall be admitted into the ports of the Philippine Islands on the same terms as American ships and merchandise. (55th Cong., Sen. Doc. No. 62, part 2, p. 210, 211.)

The declaration that the policy of the United States in the Philippines will be that of an open door to the world's commerce necessarily implies that the offer to place Spanish vessels and merchandise on the same footing as American is not intended to be exclusive. But the offer to give Spain that privilege for a term of years is intended to secure it to her for a certain period by special treaty stipulation, whatever might be at any time the general policy of the United States. (Id., p. 218.)

For the purposes of this investigation it is, probably, only necessary to call attention to the fact that the foregoing declarations of the American commissioners at the Paris conference relate to the permanent established conditions of peace, and were not made with reference to military necessities created by an insurrection not then existing.

The attention of the Secretary is directed to the probability that the German ambassador, the German consul at Singapore, and German shippers labor under the misapprehension that the restrictions on trade with the Sulu Islands imposed by the military government of the Philippines constitute the permanent regulations and established policy of the United States in regard thereto and are intended to continue after the insurrection is suppressed. If I understand the matter

rightly, these restrictions are imposed by the military government because, in the opinion of the commander of the military forces engaged in suppressing the insurrection, there is a military necessity therefor. When the insurrection is over and peace established, the question will be taken up anew, either by Congress or such agencies as Congress may authorize, or by the military government if such government is continued in charge of civil affairs. While the military government is continued it is recognized as authorized to regulate and control said matters; but its orders in regard thereto are temporary and cease when the military government ceases, unless Congress shall continue them in force. Presumably the military government in the Philippines will not be continued beyond the period of necessity therefor. The sovereignty of the United States being established, recognized, and submitted to throughout the archipelago, the nation will cease to exercise its war powers thereover and the peace powers will be exercised whenever the conditions of peace prevail.

The normal condition of this nation is that of peace. Measures intended for any other condition must be considered abnormal or temporary expedients adopted to meet existing emergencies. Under the conditions of peace, foreign trade with territory subject to the sovereignty of the United States is to be authorized and regulated by Congress. And until Congress shall determine how such trade with the Philippines shall be conducted, the regulation thereof can not be described as "permanent" nor the policy of the United States "declared."

The military government is at liberty to adopt for itself a course of action in harmony with the stipulations of said protocols. But should it do so, its action would not be binding upon the Federal Government of the United States when that Government shall deal with the archipelago under conditions of peace. If the stipulations of said protocols are admitted to be "limitations on the fee" and therefore binding upon the sovereignty of the United States, they are dependent upon Congressional action for effectiveness. They are no more self-operating than are similar provisions in treaties entered into by the United States as an original party.

The "Louisiana purchase" treaty stipulated that for twelve years French and Spanish ships and merchandise should enter the ports of the ceded territory on the same terms as American ships and merchandise. The "Florida" treaty stipulated a similar privilege for Spanish ships and merchandise in the ports of Florida. These stipulations were rendered effective by legislation. (2 U. S. Stats., sec. 8, p. 253; 3 U. S. Stats., sec. 2, p. 639.)

Attention is called to this phase of the matter, because Congress has always jealously guarded this right. (See *Annals*, first sess. 4th Cong., pp. 759, 772, 940; *Annals*, first sess. 8th Cong., debate on

Louisiana purchase: *Annals*, first sess. 14th Cong., 36, debate on commercial convention with Great Britain, 1815; 1, 2, 3, 4, and 5 Cong. *Globe*, second sess. 40th Cong., debate on purchase of Alaska.)

If the correct theory is that the military government of the Philippines derives authority to regulate, restrict, or prohibit trade with the territory subject to its jurisdiction from the laws and usages of war, and said laws and usages permit the exercise of such authority unrestrained by prior treaty stipulations, it would seem best to justify the action complained of upon that ground alone, and to determine the length of time said ports shall remain closed or under what conditions they shall be opened by the same authority. This course seems calculated to avoid complications in our foreign relations, and enables the State Department to state to foreign representatives that the closing is the result of an order of the military government intended to promote military operations, and when said military government is displaced, the question as to whether or not the previous treaties in regard to trade are binding upon the United States will be taken up by that Department in conjunction with Congress and the Executive.

If these views are correct, it becomes necessary to respectfully direct the attention of the Secretary to the language used by Major-General Otis in his communication to the United States consul-general at Singapore, wherein he apparently fails to preserve the distinction between the military government of the Philippines (for which he was authorized to speak) and the Federal Government of the United States (for which he was not authorized to speak). Said language is as follows:

United States maintain that protocols 1877, 1885, granting free trade in Sulu Archipelago expired with transfer of sovereignty by Spain.

And again Major-General Otis writes:

Of course the former trade protocols between Spain, Great Britain, and Germany fall with the transfer of sovereignty under the late Paris treaty.

The language used by Major-General Otis was communicated to the German consul by Consul-General Moseley. (See copy of correspondence, submitted by State Dept., Doc. No. 1, case 850.)

Consul-General Moseley also sent to the English colonial secretary at Singapore a copy of the cablegram from Major-General Otis in which this language appears. He forwarded copies of his correspondence with the English colonial secretary to the State Department, and the Secretary of State transmitted said copies to the Secretary of War. (See files in case No. 474, Doc. No. 32-33.)

The Secretary of State in transmitting the correspondence between Consul-General Moseley and the German consul at Singapore states the purpose of the reference as being "for such suggestions, if any, as you may deem proper, for communication to the Consul-General."

\* \* \* (See Doc. No. 1, case 850.)

The Secretary of State in transmitting copy of correspondence between Consul-General Moseley and the English colonial secretary of the Straits Settlements states the purpose of the reference as being "for your information and files."

At the time these references were made to this Department the particular instances to which the correspondence related were each closed. That is to say, the foreign representatives had asked a question of fact, to wit: Were the ports of the Sulu Islands open, and answer was made that they were not. To this answer the German consul made no reply and the English colonial secretary stated that he had referred the matter to his home Government. Naturally the War Department viewed the matter from the standpoint of the military government, and considered the question of fact as the important feature. Since the correspondence correctly set forth the *fact* that said ports were closed, there seemed to be nothing further to say. But the State Department subsequently requested answers to said letters of reference, and thereupon it seemed likely that the State Department considered the alleged reason for justifying the fact as more important than the fact itself. Probably this appears true from the standpoint of that Department. It further appears possible to the writer that the State Department may take exception to the language used by Major-General Otis as being an attempt on his part to exercise the functions of the State Department.

It is quite difficult to preserve at all times and in all matters the true distinction between the military government of the Philippines and the Federal Government of the United States. It is also difficult for the head of the military government to preserve in speech and action the distinction between his position as commander of the United States military forces in the Philippines and that of chief executive of the military government of civil affairs in the Philippines. Burdened as Major-General Otis was by the great multitude of onerous duties resulting from the complicated situation, it is not surprising that in wording or signing a cablegram he did not observe the accuracy of expression ordinarily found in state documents. Major-General Otis during his administration in the Philippines usually preserved the distinction with accuracy. It is more than probable that as his communication was addressed to an American consul-general he relaxed his observance of technicalities, presuming his correspondent, being aware of the distinction, would preserve it.

The attention of the Secretary is directed to the fact that while it was probably right and proper for the United States consul-general at Singapore to inquire of the military governor of the Philippines if the ports of the Sulu Islands were open to foreign commerce, and for the military governor to state the *fact*, it does not follow that the consul-general is authorized to look to the military governor for

information and instruction regarding the fixed policy of the United States as to its treaty obligations. If such information is volunteered, it would be well for the consul-general to consider it confidential or refer it to the Secretary of State, before communicating it to the representatives of foreign nations as an authoritative utterance of the United States Federal Government.

I do not wish to be understood as reporting that the military governor of territory subject to military occupation may not in any case pass upon or interpret stipulations of a treaty. Many cases arise where he may do so. For instance, if an individual domiciled within or coming into the territory asserts a right to be exercised therein under a treaty, the military governor may determine if the exercise of such right is to be permitted and if the individual possesses it. But the question so presented is domestic and not foreign, and the action of the governor is quasi judicial and not political. In such instances he speaks for the military government of the Philippines and not the Federal Government of the United States.

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The views expressed in the foregoing report were approved by the Secretary of War.

In response to the letter from the State Department, transmitting the note from the imperial ambassador of Germany at this capital, the Secretary of War advised the State Department as follows:

OCTOBER 15, 1900.

SIR: I have the honor to acknowledge the receipt of a communication from the State Department, dated August 15, 1900, transmitting a copy of a note addressed to the Secretary of State by the imperial German ambassador at this capital, wherein complaint is made against the orders of the military government of the Philippine Archipelago, whereby commercial intercourse with the inhabitants of the Sulu Islands was at one time prohibited and subsequently restricted to the ports in the possession of the military forces of the United States, in which ports it is subject to certain regulations.

I note your statement that you "shall be glad to transmit to the embassy your reply to its expressed hope that the military orders of which complaint is made will be rescinded."

Replying to your communication, I have the honor to state as follows:

The Sulu Islands are now subject to military occupation. The right of the commander of the occupying force to regulate or prohibit trade with territory so occupied is one of the recognized and well-received laws and usages of war and nations. (9 How. (U. S.), 615; Lieber's Instructions to American Armies in the Field, sec. 5, clause 1; Bluntschli, I, sec. 8; Manning, p. 167; Birkhimer, p. 204.)

In addition to the maintenance of military occupation of the Sulu Islands, the military forces of the United States are engaged in suppressing an insurrection in a portion of the Philippine Archipelago accessible from the Sulu Islands. The military authorities conducting the military operations against said insurrection were at one time of the opinion that a military necessity existed for prohibiting commercial intercourse between the Sulu Islands and the outside world. Thereupon Admiral

Dewey, as commander of the military forces of the United States in the Philippines, in June, 1899, issued the following order:

"All trade with the Philippines is prohibited, except with the ports of Manila, Iloilo, Cebú, and Bakalota. Ships are hereby warned to go nowhere else in the Philippines."

Subsequently this order was modified by General Orders, No. 73, series of 1899, dated December 26, 1899; General Orders, No. 30, series of 1900, dated March 10, 1900, and General Orders, No. 34, series of 1900, dated March 13, 1900. Copies of said orders are herewith inclosed.

The military authorities in command of the United States military forces in the Philippines are of opinion that the restrictions and regulations upon trade with the Sulu Islands, now enforced pursuant to said orders, are essential to meet the military necessity occasioned by the insurrection.

These restrictions and regulations are emergency measures, and should be so considered. They are not intended as an evidence or declaration of the permanent policy or practice of the United States when the condition of peace shall prevail in the Philippines.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

The SECRETARY OF STATE.

In response to the letter from the State Department transmitting the correspondence between the German consul and the United States consul at Singapore, the Secretary of War advised the State Department as follows:

OCTOBER 15, 1900.

SIR: I have the honor to repeat the acknowledgment of the receipt of your letter of April 17, 1900, and to answer the same as follows:

Your letter inclosed for the consideration of the Secretary of War a copy of the correspondence between the United States consul-general at Singapore and the German consul at Singapore in regard to trade with the inhabitants of the Sulu Archipelago.

The letter of the German consul is as follows:

"I have the honor on behalf of some German merchants who are desirous of trading in the Sulu Islands to request you kindly to inform me whether the right guaranteed to German (and other) merchants by Article IV of the treaty concluded between the Governments of Spain, Great Britain, and Germany March 7, 1885, to trade in those islands free and unmolested is recognized by the Government of the United States, or if any and what restrictions are placed on the carrying on of that trade."

It is to be noted that the German consul sought information as to whether or not the "*Government of the United States*" recognized certain rights of trade guaranteed by treaty concluded between the Governments of Spain, Great Britain, and Germany March 7, 1885.

The answer to this request involves the determination of certain questions as to the existing relations between the sovereignty of the United States and the respective sovereignties of Germany, Great Britain, and the other powers. Such questions are to be dealt with by the Federal Government of the United States, acting through that branch of the Federal Government to which our foreign relations are committed.

If this view is correct, it would seem to follow that upon such request being received by the American consul, the proper course for him to pursue would be to refer it to the State Department for instruction and advice.

I note that in his letter to the United States consul-general the German consul

states that he makes the inquiry "on behalf of some German merchants who are desirous of trading in the Sulu Islands," and that he speaks of the right under the treaty as being "guaranteed to German (and other) merchants."

It may be that the purpose of said letter extended no further than to secure information as to the *fact* of whether or not the ports of the Sulu Islands were open to trade from the outside world. If this were the full extent of the inquiry, it was probably proper and permissible to refer such request for information to the military government of the Philippines. This was the course adopted and pursued by the United States consul-general who received the communication. Upon receiving the response of the military government, the United States consul-general wrote to the German consul as follows:

"I have the honor to communicate for your information the following extract of a telegram of date 14th November, 1899, and of letter of 10th December, 1899, received from his excellency Gen. E. S. Otis, military governor of the Philippine Islands, giving expression of his opinion on the subject:

[Telegram of 14th November, 1899.]

"United States maintain that protocols 1877, 1885, granting free trade in Sulu Archipelago, expired with transfer of sovereignty by Spain."

[Letter dated Manila, 10th December, 1899.]

"Of course the former trade protocols between Spain, Great Britain, and Germany fall with the transfer of sovereignty under the late Paris treaty."

"I would add that foreign vessels are not permitted to engage in the coasting trade and that the customs regulations in force in Manila apply to all other open ports of the Philippine Islands."

The military government of the Philippine Archipelago, maintained therein by the United States, is engaged in suppressing an insurrection in a portion of said Archipelago accessible from the Sulu Islands. The military authorities conducting the military operations against the insurrection were at one time of the opinion that a military necessity existed for prohibiting commercial intercourse between the Sulu Islands and the outside world. Thereupon Admiral Dewey, as commander of the military forces of the United States in the Philippines, in June, 1899, issued the following order:

"All trade with the Philippines is prohibited, except with the ports of Manila, Iloilo, Cebú, and Bakalota. Ships are hereby warned to go nowhere else in the Philippines."

Subsequently this order was modified by General Orders, No. 73, series of 1899, dated December 26, 1899; General Orders, No. 30, series of 1900, dated March 10, 1900, and General Orders, No. 34, series of 1900, dated March 13, 1900. Copies of said orders are herewith inclosed.

The military authorities in command of the United States military forces in the Philippines are of opinion that the restrictions and regulations upon trade with the Sulu Islands now enforced pursuant to said orders are essential to meet the military necessity occasioned by the insurrection.

These restrictions and regulations are emergency measures, and should be so considered. They are not intended as an evidence or declaration of the permanent policy or practice of the United States when the condition of peace shall prevail in the Philippines.

The Sulu Islands are now subject to military occupation. The right of the commander of the occupying force to regulate or prohibit trade with territory so occupied is one of the recognized and well-received laws and usages of war and nations. (9 How. (U. S.), 615; Lieber's Instructions to American Armies in the Field, sec. 5, clause 1; Bluntschli, I, sec. 8; Manning, p. 167; Birkhimer, p. 204.)

In regard thereto, Birkhimer on Military Government says (p. 204)

"One of the most important incidents of military government is the regulation of trade with the subjugated district. The occupying State has an unquestioned right to regulate commercial intercourse with conquered territory. It may be absolutely prohibited, or permitted to be unrestricted, or such limitations may be imposed thereon as either policy or a proper attention to military measures may justify. While the victor maintains exclusive possession of the territory his title is valid. Therefore, the citizens of no other nation have a right to enter it without the permission of the dominant power. Much less can they claim an unrestricted right to trade there."

This authority of the commander of the occupying force is not to be exercised in accordance with the existing treaty obligations of his Government nor in defiance thereof; it is to be exercised without reference thereto, and with reference solely to the purposes of the military undertakings in which he engaged.

The full purpose and extent of the existing restrictions and regulations of outside trade with the Sulu Islands are to provide for a military necessity, the existence of which affords them justification. Such rights of trade in said islands as are dependent upon trade treaties relate to the conditions of peace, and are properly to be held in abeyance until those conditions prevail in the Philippines. Such, at least, is the view entertained by me. If you are unable to agree with the views herein expressed I should be greatly obliged to you if you will favor me with the views entertained by you regarding this subject, as it is important that unnecessary complications be avoided.

The military governor of the Philippine Islands does not of course undertake to state the permanent tariff policy of the United States in those islands, or the position of this Government as to former treaties between Spain and other powers. His authority is limited to the temporary treatment of the subject during military occupation and his expressions should be regarded as so limited.

Yours, very respectfully,

ELIHU ROOT, *Secretary of War.*

THE SECRETARY OF STATE.

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## **IN RE CLAIMS MADE AGAINST THE UNITED STATES BY REASON OF THE MILITARY OPERATIONS, ENCAMPMENT OF TROOPS, CONDUCT OF SOLDIERS, ETC., IN PORTO RICO, CUBA, HAWAII, AND THE PHILIPPINES.**

[Submitted February 6, 1901. Case No. 2491, Division of Insular Affairs, War Department.]

### **SYNOPSIS.**

1. Aliens asserting claims for unliquidated damages against the Federal Government of the United States must present them to the State Department through diplomatic channels.
2. In 1874 Congress adopted the rule that it would not consider the claims of aliens except upon the request of the State Department.
3. A belligerent is not required to pay for damages to persons or property of enemies or neutrals which, being in the track of war, may be injured by military operations.
4. The United States is not liable for injuries resulting from the unauthorized acts of individual soldiers.
5. A sovereign nation is not ordinarily responsible to alien residents for injuries they receive on its territory from belligerent action, or from insurgents whom the sovereign could not control.



6. The United States, while exercising the rights of a belligerent, may occupy real property and seize personal property belonging to private individuals and apply it to the use and benefit of the troops, without liability for compensation.
7. The right to impress the desired property may be waived and liability for compensation created by the action of the military authorities, if such action is taken prior to or at the time the property is devoted to the use of the Army and is sufficient to create a contract, express or implied. If such action is not taken at that time the military authorities cease to possess such authority and the waiver must be made by Congress.
8. The existence of a contract, express or implied, being established, the Secretary of War is authorized to settle and determine claims based thereon or arising therefrom.

SIR: I have the honor to acknowledge the receipt of your request for a report on the numerous claims made against the United States, of the character indicated in the title, now on file in the Insular Division, to the end that the final action of the War Department may be taken thereon.

In compliance with said request I have the honor to report as follows:

These claims are made against the Federal Government of the United States. They are not made against one of the military governments.

Examination leads me to the conclusion that in a majority of the cases, for want of jurisdiction to pass upon the merits, the action of the War Department must be confined to informing the claimant as to his proper remedy. As to a large portion of these claims, not only is the War Department without jurisdiction to settle the questions involved, but in addition there are no available funds with which the War Department could pay said claims if the liability of the United States and the amount thereof were established.

The want of jurisdiction arises from the fact that said claims are for unliquidated damages. The determination of unliquidated damages requires the exercise of judicial powers. It is well established that the Executive Departments of the United States Government do not possess judicial powers and therefore can not exercise them.

There is a recognized exception to this general rule, which will be considered hereinafter. Ordinarily, when a claim for unliquidated damages is presented to the War Department, the claimant is advised of the want of jurisdiction to determine his claim and is thereafter permitted to select his remedy, or the claim and accompanying documents are forwarded to Congress for consideration by that body.

The claimants in the cases under consideration presumably possess little, if any, knowledge of the distribution of powers among the several branches of our Government, and therefore a rejection of their claims without explanation would hardly be consistent with the candor and high regard for private rights which is expected from the Federal Government of the United States.

With but few exceptions, the reference of these claims to Congress

by the War Department is inadvisable, for the reason that the claimants are either aliens at the present time or were aliens at the inception of their claims.

At the close of the civil war a large number of "alien claims" was presented to Congress. In 1874, upon the recommendation of the Committee on "Alien Claims," Congress assumed the position that the right of petition guaranteed by the Constitution enabled a citizen of the United States presenting a claim against this Government to Congress to demand the consideration of said claim as a *right*; that said privilege did not extend to aliens; and thereupon Congress declared that claims of aliens can not properly be examined by a committee of Congress, there being a Department of this Government in which most questions of an international character may be considered—that which has charge of foreign affairs; that Congress can not safely and by piecemeal surrender the advantage which may result from diplomatic arrangements; that this has been the general policy of the Government, and Congress has not generally entertained the claims of aliens and certainly should not unless on the request of the Secretary of State. (See Report No. 498, Committee on War Claims, 1st sess., 43d Cong., May 2, 1874.)

Said report also contains the following letter:

DEPARTMENT OF STATE,

Washington, April 22, 1874.

SIR: In reply to your telegram stating that claims are presented by French citizens and other aliens through Congress to the Committee on War Claims, I have to remark that such presentation is entirely inconsistent with usage, which requires that aliens must address this Government only through the diplomatic representatives of their own governments.

This Department refuses to entertain applications or to receive claims from aliens except through a responsible presentation by the regularly accredited representative of their government.

I have also been under the impression that Congress refused to receive petitions or claims from aliens. Such I am advised was at one time the rule of the House of Representatives, and such is the rule at present in the Senate, as I am informed. The propriety of the refusal to allow an alien to intrude his claims upon Congress can not be questioned.

I have the honor to be, sir, your obedient servant,

HAMILTON FISH.

HON. WILLIAM LAWRENCE,

House of Representatives.

I am unable to discover that the practice thus established has been abandoned. It therefore seems advisable for this Department to conform thereto.<sup>a</sup> The advantage and propriety of pursuing the course marked out by Congress appears most clearly when examination is made of the claims preferred by citizens of Spain and alien claims for depredations by the insurgents.

The claims of aliens now being considered are presented to this

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<sup>a</sup>See letter of Secretary of War to Secretary of State, page 409.

Department by the individuals themselves instead of being presented to the Government of the United States by the sovereignty to whom the claimant owes allegiance. If these claimants were required to deal with the State Department, they would be obliged to invoke the assistance of their sovereign in presenting the claim in order to comply with what Secretary Fish designates the "usage which requires that aliens must address this Government only through the diplomatic representatives of their own governments." My understanding of this usage is that it requires the alien claimant to present his claim to his own government. If his government considers the claim just, it may then undertake to secure the payment, and for that purpose presents the claim with its approval (express or implied) to the United States. The mere transmission of said claim by a consul or minister as the representative of the claimant is not sufficient. If these claimants are required to secure the approval or indorsements of their claims by their governments, there is little doubt that many of them will be advised that said claims are not well founded and the United States not liable therefor, as said claims are incompatible with the established principle that foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of war. Such course was pursued by Great Britain when requested to present claims against Germany of English citizens domiciled in France for damages sustained during the Franco-Prussian war, and also by the United States when property belonging to its citizens was destroyed during the bombardment of Valparaiso by the Spanish fleet during the war between Spain and Chile. An adverse determination made by his own government will probably be accepted with better grace by a claimant than if made by the United States.

Several claims of this character, included herein, when presented to the military authorities of the United States, were submitted to military boards for investigation. But this is not to be construed as a recognition of the claims. The purpose of such reference was to secure a knowledge of the facts while the evidence was obtainable, for the subsequent use of this Government.

If the War Department shall not attempt to deal with alien claims, the final action of the Department on such claims now pending therein would be to return the papers to the claimant and advise him of such determination. This is all that is absolutely *required*. But the conditions existing in the territory in which said aliens are domiciled and the claims originate (Porto Rico, Cuba, Hawaii, and Philippines) may induce the Secretary to go further and inform these claimants as to the necessity of procuring the indorsement of their sovereign government and the presentation of their claim thereby. If so, what advice shall be given to those claimants who were Spanish subjects at the time the injuries complained of were inflicted, but subsequently adopted the nationality of the territory in which they are domiciled?

Shall they be advised to invoke the assistance of their abandoned sovereign in dealing with the United States? Since the result to be attained is to secure the friendly offices of the State Department in a matter of which Congress is the final judge, such result could undoubtedly be accomplished by having said claims presented to the State Department by the Government which is now exercising sovereignty in the territory the nationality of which has been adopted by the claimant.

If the papers now on file in many of these claims made by persons who were once Spanish subjects showed that the claimants have adopted the nationality of their domicile, the Secretary of War could transmit the claims to the State Department, where they would undoubtedly receive attention, but the showing is not made and therefore it appears necessary to return them to the claimants or call on them for a showing as to their present nationality.

## II.

Upon investigating the merits of these claims it appears, in a majority of instances, that the facts involved do not create a liability on the part of the Federal Government of the United States.

This raises the question, Shall the claimants be so advised by the War Department? These objections are as follows:

Article VII of the treaty of peace with Spain provides as follows:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

Indemnity means a reimbursement of a loss sustained. It is a large word and easily covers the claims of Spanish citizens now under consideration. Apparently it was inserted in the treaty to preclude the possibility of diplomatic complications which would inevitably result if either nation were permitted to present and urge the claims of its citizens against the other arising from the conditions produced by the war. I am of opinion that said waiver by Spain affected the claims for indemnity of all persons who were citizens or subjects of Spain at the time the treaty went into effect as a national compact, and such waiver was not avoided by a subsequent change of nationality.

## III.

A number of these claims are for compensation for *damage*. By "damage" is meant, as here used, loss or injury resulting from matters to which the claimant did not consent, the purpose of such

classification being to distinguish them from claims founded on contract.

The objections to the settlement by the War Department of such claims for damage are:

1. That said damages are unliquidated and the War Department is without authority to settle and adjust claims for unliquidated damages. (22 Op. A. G., 441-442.)

It is believed to have been the uniform practice of the War Department to abide by the well-established legal principle which precludes the executive branch of the Government from allowing claims for damages to property destroyed or injured in the common defense or due prosecution of war against public enemies. (Mr. Belknap, Secretary of War, to Mr. Lawrence, Feb. 24, 1874.)

2. A number of these claims are for damages occasioned by the military forces of the United States while engaged in actual hostilities and in performance of active military operations in enemy's country, pursuant to the orders of commanding officers and the purposes of the war.

A belligerent is not required to pay for damages to persons or property of enemies or neutrals which, being in the track of war, is injured by military operations. (Vattel, Book III, chap. 15, sec. 232; *United States v. Pacific Railroad*, 120 U. S., 233-239; Wharton's Int. Law Dig., vol. 2, sec. 224, p. 582 et seq.)

A neutral's residence in an enemy's country exposes his property to enemy's risk. (Wharton's Dig. Int. Law, vol. 3, chap. 17, sec. 352, p. 341.)

#### IV.

Some of these claims are based on the unauthorized action of individual soldiers; acting, not in the performance of orders, but in violation of the military code, the Instructions to the Armies of the United States in the Field, the law and usages of war, and international law. For injuries of this character no legal responsibility would attach to the Government.

The United States is not responsible for unlawful acts of soldiers or employees, and the Secretary of War is not empowered to allow a claim for personal property stolen or illegally appropriated by a soldier. (J. A. G. Op., p. 260, sec. 16, Id., p. 248; Moore International Arbitrations, p. 2975.)

The remedy in such cases is by civil suit against the offender and by prosecution under the criminal laws.

#### V.

Certain of these claims are for compensation for injury to persons or for damage or destruction of property by insurgents in the Philippines. The general rule is that a sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory

from belligerent action or from insurgents whom he could not control. (Wharton's Dig. Int. Law, vol. 2, chap. 9, sec. 223, p. 576.)

There seem to be limitations to this rule, two of which have been advanced by our Government, as follows:

A government is liable internationally for injury inflicted on aliens through its negligence in permitting insurgents to destroy the property of such aliens and by its subsequent implied ratification of the conduct of such insurgents, there being no redress offered in the courts of such government. (Mr. Frelinghuysen, Secretary of State, to Mr. Baker, April 18, 1884, MSS. Inst. Venez.; also, Mr. Bayard, Secretary of State, to Mr. Baker, May 12, 1885.)

Whether a nation is responsible for spoliation by insurgent authority which for a time obtain possession of part of its territory depends upon the question how far such authorities were, in international law, capable of binding the nation by their acts. (Mr. Seward, Secretary of State, Report March 30, 1861.)

The War Department can not be expected to hold that the Government of the United States is guilty of "negligence in permitting insurgents to destroy property" in the Philippines, nor to hold that the insurgent authorities are, "in international law, capable of binding the nation by their acts."

An examination has been made as to the authority of the Secretary of War to refer these claims to the Court of Claims, under the provisions of the act approved March 3, 1883. (Bowman Act, 22 Stat. L., 485.)

The rule seems well established that the Secretary of War is at liberty to refer to that court only such claims as he could determine, i. e., such claims as are within the jurisdiction of the War Department.

The transfer of a claim under the Bowman Act does not carry with it an increase of power over the matter in controversy. If the department be without jurisdiction of the claim, the court is without power to determine the case upon its merits (*Illinois v. United States*, 20 Ct. Cls., 342.)

To enable the court to take cognizance of a claim transmitted to it by the head of a department under the Bowman Act, it must appear that such claim was one which that department has authority to settle or adjust. (*Pitman et al. v. United States*, 20 Ct. Cls., 254; *McClure and Porter's case*, 19 Ct. Cls., 30; *Hart's case*, 15 Ct. Cls., 414.)

An alien may maintain an action in the United States Court of Claims, under certain conditions set forth in section 1068, Revised Statutes, as follows:

Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.

The Secretary may desire to know if the Spanish Government permitted citizens of the United States to maintain suits against said Government in the courts of Spain.

### The Court of Claims say:

Of all the governments of Europe, it is believed that Russia alone does not hold the State amenable in matters of property to the law. Of all the countries whose laws have been examined in this court, Spain only resembles the United States in fettering the judicial proceedings of her courts by restrictions and leaving the executions of their decrees dependent upon the legislative will. \* \* \* The records of this court also show that, within the present century, an American citizen recovered a judgment against Spain, in a Spanish tribunal, to the very large amount of \$373,879.88, and that he elected to retain Spain as his debtor when the decree was about to be transferred to and assumed by the United States, and that his choice was judicious, for though thus transferred and assumed, the debt has never been paid. (Meade's case, 2 Ct. Cls., 225.)

The "Spanish tribunal" which rendered the "decree" above referred to was a *junta* or commission having special powers. The existing condition of the law in Spain appears to be that the courts may entertain the suit of a citizen or alien against the Government and render judgment therein, but can not enforce the decree. The relief afforded by the United States Court of Claims extends no further, and therefore Spain complies with the reciprocity requirements of section 1068, Revised Statutes of the United States.

### VI.

About forty of the cases included in the number now undergoing investigation present the question of the authority of the Secretary of War to settle and adjust claims based on *implied* contracts. These claims arise from a condition of facts substantially as follows:

Property belonging to the claimant was taken and used by the United States for the support or other benefit of the Army. At the time of the taking and use the military authorities contemplated and intended that compensation should be made therefor. In some instances parol agreements were made to that end; but in others, because of absence of the owner, inability to speak the language, want of time, or other reason, no express agreement was entered into with the owner. The owner now seeks compensation for his property so used, basing his right thereto upon either a parol or implied contract for payment of a *quantum meruit*.

It is undoubtedly true that the United States, while exercising the rights of a belligerent, may temporarily occupy real property and seize personal property belonging to private individuals and apply it to the use and benefit of the troops, without liability for compensation.

It is equally true that the United States is not *obliged* to pursue such course, but is at liberty to refrain therefrom; and if it desires to occupy or use and consume the property of a private individual, even that of an enemy, it may subject itself to the liability at the time of the taking, in which event the compensation partakes of the character of *debt*; or the United States may decide, after the taking, to waive its

exemption, in which event compensation partakes of the character of *bounty*.

The right of the Government to impress the desired property may be waived and liability for compensation created by the action of the military authorities if such action is taken prior to or at the time the property is devoted to the uses of the Army and is sufficient to create a contract, express or implied. If such action is not taken at that time, the military authorities cease to possess such authority, and the waiver must be made by Congress.

The military authorities accomplish such waiver and create the liability by entering into a contract with the proprietor. If the contract is in writing and entered into pursuant to the provisions of section 3744, Revised Statutes, the Government is bound to pay the price stipulated in the contract. If the contract is not reduced to writing, the Government is liable for the fair market value.

Contracts not in writing may be divided into two general classes, express and implied. It is well established that the Secretary of War may determine the merits of and amount due upon claims made for property actually devoted to the uses of the Army, where the contract was *expressed* either in writing or in parole. I am unable to report that it is also established that the Secretary may determine the questions arising where the contract was *implied*, although the reasoning which establishes the authority in one instance carried to its logical conclusion establishes a like authority in the other. The liability of the Government arises from the fact that the taking and using was accompanied by an intention to pay therefor; and the authority of the Secretary of War to act upon the matter arises from the fact that a contract exists and—

Executive officers have jurisdiction of claims for money due on contracts, though the exact amount be not fixed thereby. (20 Court Claims, 119.)

The line between liability and nonliability of the Government is plain. As stated by the Court of Claims, it is as follows:

There is a distinction to be drawn between property used for Government purposes and property destroyed for the public safety. If the conditions admitted of it being acquired by contract and used for the benefit of the Government it may be regarded as acquired under an implied contract; but if the taking, using, or occupying was in the nature of destruction for the general welfare, or incident to the ravages of war, and whether brought about by casualty or by authority, and whether on hostile or national territory, the loss (in the absence of positive legislation) must be borne by him on whom it falls. (*Heflebower v. United States*, 21 Court of Claims, 229, 237.)

In *Clark v. United States* (95 U. S., 539) the majority of the court held that the terms of an oral agreement with the Secretary of War were not binding upon the United States in the sense that the specific provisions thereof could be enforced by the contractor; but the court say (p. 542):



We do not mean to say that where a parole contract has been wholly or partially executed and performed on one side the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

Miller, Field, and Hunt, J. J., dissented and were of opinion that the terms of an oral agreement became binding upon the United States when the agreement was performed. In voicing their dissent Mr. Justice Miller said (p. 546):

If there is any branch of the public service where contracts must often be made speedily, and without time to reduce the contract to writing, it is in that of the Army. Sudden occasions for supplies, for the occupation of buildings, for the transportation of food and munitions of war are constantly arising, and in many of them it is impossible to do more than demand what is wanted and agree to pay what it is worth. Did Congress intend to say that the patriotic citizen, who said "take of mine what is necessary," is to lose his property for want of a written contract, or be remitted to the delays of an act of Congress?

In *Wilson v. United States* the Court of Claims say:

This oral arrangement between the parties was not binding upon the defendants *as a contract*. \* \* \* The legal effect of the oral arrangement was, that if the claimants should go on with the work they would become entitled to compensation, upon an implied assumpsit, for the value of so much as they should actually perform. (*Wilson v. United States*, 23 Court of Claims, 77, 81.)

In *United States v. Bostwick* (94 U. S., 53) the court recognize that the United States may contract by implication. In that case the court say (p. 66):

The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.

And again (*Id.*):

There are in this contract no stipulations to take the place of or in any manner restrict this implied obligation on the part of the United States growing out of their relation to the petitioner as his lessee.

The existence of a contract being conceded or established, has the Secretary of War authority to determine the amount of the *quantum meruit*?

In *Dennis v. United States* (20 Ct. Cls, 119) the court held (2 Syllabus):

The executive officers have jurisdiction of claims for money due on contracts, though the exact amount be not fixed thereby.

In the body of the opinion the court say (p. 121):

Technically all claims for money due on contracts, where the exact amount payable is not thereby fixed, as in the case of goods purchased or work done without an agreed price, are claims for unliquidated damages. But they arise necessarily and of course from otherwise fulfilled and executed agreements, and their settlement rarely requires anything more than the ordinary processes of accounting, the prices being readily determined by the vouchers and reports of the public officers incurring

the expenses, or by other means within reach of the accounting officers, who very properly take jurisdiction and pass upon such claims.

(See also *McClure v. United States*, 19 Ct. Cls., 179-180; *Satterlee, admix. et al v. United States*, 30 Ct. Cls., 51-54; *United States v. Corliss Steam Engine Co.*, 91 U. S., 321; *United States v. Bostwick*, 94 U. S., 53.)

In opinion on the claim of the Snow and Ice Transportation Company, rendered to the Secretary of War, April 12, 1899, the Attorney-General says (22 Op. A. G., 441-442):

The Court of Claims has repeatedly held that, unless authorized by Congress, heads of Departments have no power to adjust the pay claims for unliquidated damages, even when arising from breach of contract. A well-recognized exception is the case of claims for work and labor done or materials furnished under contract silent as to price and the amount therefore unliquidated.

The rule appears to be that a claim for *quantum meruit*, based upon a contract which has been performed, is to be distinguished from a claim for unliquidated damages, and the War Department has authority to determine the amount of the *quantum meruit*. The question now presented is: May the Secretary of War exercise this authority of determination when the contract is implied?

An analogous question arose upon the application for payment of rent for lands used for Camp Meade, Pennsylvania, and was referred to the Comptroller of the Treasury, who decided that the claim might be settled and paid by the War Department. The Comptroller decides the rule to be as follows:

1. If property was impressed, that is, taken without the consent of the owners, and without agreement as to rental, the claim is for unliquidated damages and the War Department is without jurisdiction. (See letter to Sec. of War, April 13, 1899.)

2. If "the property was taken with the knowledge and consent of the owners thereof, under and pursuant to a parol agreement between the Government and said owners that the Government should use and occupy said property and pay to said owners a fair and just compensation for such use and occupation, but the amount of compensation was not fixed by said agreement, and that subsequent to such use and occupation and heretofore the amount of compensation has been agreed upon between the proper officers of the Government and said owners, I am of opinion that the same may be paid. Not upon a statutory contract because the parol agreement, not having been reduced to writing and signed by the parties, was by section 3744, Revised Statutes, void, but the agreement, although void, having been acted upon and executed by said owners, they are entitled to the reasonable value for the said use and occupation of said property, and if the same has been determined and agreed upon between the proper officers of the Government and said owners, and the amount fixed, it may be paid." (See letter to Sec. of War, April 19, 1899.)

It will not escape the observation of the Secretary that the Comptroller confines the jurisdiction to parol contracts duly performed. He does not expressly decide that the Secretary of War has a like jurisdiction where the contract is *implied*. From the reasoning of his decision it appears to the writer that the rule would be the same in both instances. The jurisdiction arises from the fact that a contract exists—written, parol, express, or implied. The Comptroller decides that the stipulations of the parol contract are rendered void by the

provisions of section 3744, Revised Statutes, but, having been acted upon, a liability to pay a reasonable value was created. This liability arises from the use or occupation which was lawful and authorized; it is not dependent upon the fact that the conditions of the using were expressed, for the expression, being in parole, was void. Otherwise, both liability and jurisdiction are made to depend upon the one thing in the transaction which was illegal and void. The opinion of the Comptroller was given in a case where the contract was in parole. But the general principle deducible therefrom is that if the authorities took the property for the use of the Army, intending to pay for it, and devoted the property to the use of the Army, and the owner at the time or thereafter acquiesced, a claim for such payment is founded on contract, and the Secretary of War may settle and pay it. On the other hand, if the taking or destruction of the property was not done for the use of the Army, but to promote military operations or the purposes of the war, and the authorities did not intend to pay therefor, then the claim would be for unliquidated damages. Such, for instance, would be a claim for damage to crops, fences, or structures by any army on its march even in loyal territory; or for temporary occupancy of houses and land necessary on a march, preparatory to a battle, during battle or afterwards, for hospitals, officers, and stores; or for material to build breastworks, fortifications, etc.; or property destroyed to weaken the enemy or promote the operations of our troops; or the seizure of enemy's property for the purposes of the war.

It would seem as though the proper test is: Was the property taken for and devoted to the use of the troops with the intention of paying therefor, and does the owner assent thereto? (*Waters v. United States*, 4 Ct. Cls., 299; *Provine v. United States*, 5 Ct. Cls., 433; *Kimball v. United States*, 5 Ct. Cls., 252; *Stevens v. United States*, 2 Ct. Cls., 95; *Ayers v. United States*, 3 Ct. Cls., 1.)

The consent of the owner is undoubtedly essential to the creation of the contract. But it would be unjust to require the owner to establish that he evidenced his consent at the time of or prior to the taking, for he may not have been present or in the vicinity, or being present was in ignorance of his rights or situation. It would seem sufficient if he is now willing to carry out the intentions entertained by the authorities of the United States at the time the property was taken and used.

In such cases, the important feature would be to ascertain the character of the taking. Was it impressment or not? This question turns upon the intent of the military authorities, and, in the absence of direct evidence, must be determined by existing conditions and attendant circumstances. Who is so well able to declare the intent of the military authorities or to adjudge the significance of conditions and circumstances as the Secretary of War?

As a measure of economy, I doubt not that it would be to the advantage of this Government to have such claims settled by the Secretary of War instead of sending them to Congress. The experience in settling the claims arising during the civil war, by Congress, demonstrates the wisdom of securing settlements while a knowledge of facts and values is ascertainable.<sup>a</sup>

The views expressed in the foregoing report were approved by the Secretary of War, and by his direction the chief of the Division of Insular Affairs transmitted copy to the military governor of Cuba, the civil governor of the Philippine Islands, the commander of the United States military forces in the Philippine Islands, the office of the Judge-Advocate-General, U. S. A., and the chief clerk of the War Department.

<sup>a</sup> The question discussed in foregoing Subdivision VI being referred to the Comptroller of the Treasury, that official determined the matter as follows:

TREASURY DEPARTMENT,  
OFFICE OF COMPTROLLER OF THE TREASURY,  
Washington, March 12, 1901.

THE SECRETARY OF WAR.

SIR: I have received your letter of February 16, 1901, as follows:

"I have the honor to request your opinion on a question arising in a number of claims against the Government for compensation for private property, taken by order of the military authorities and devoted to the use of the troops, whereby proper subsistence, shelter, etc., was afforded them.

"At the time the private property was taken the military authorities intended that compensation should be made, but for lack of time, inability to speak a common language, absence of the owner, or other cause, an *express* contract, either in writing or parol, was not formulated. There exists an *implied* contract to pay the fair market value of said property, which contract may be established, either by the evidence of the officer who ordered the taking or by attendant facts, circumstances, and conditions.

"The question thus raised is as follows: Has the Secretary of War authority to settle and order payment of a claim for money due on an *implied* contract which has been performed?

"At my request the law officer of the Division of Insular Affairs of this Department has prepared a report on this question in connection with the general subject of claims. I transmit herewith a copy of said report, and call your attention to Subdivision VI, wherein the question submitted is discussed.

"It will greatly simplify the work of this Department in dealing with claims of the character indicated if it is determined that the Secretary of War may exercise as to implied contracts an authority such as he exercises where the contract is in parol."

Subdivision VI of the report referred to by you is as follows:

\* \* \* \* \*

The question presented for my decision is, Has the Secretary of War authority to settle and order payment of a claim for money due on an implied contract which has been performed?

It has frequently been held that where there has been an *express* contract, either in writing or parol, for the performance of certain things, and the consideration has

## MINING CLAIMS AND APPURTENANT PRIVILEGES IN CUBA, PORTO RICO, AND THE PHILIPPINES.

[Submitted May 22, 1900. Case No. 1525, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the reference to me, with a request for a report thereon, of several letters of inquiry to the Department regarding the procedure to be followed in securing mining claims and appurtenant privileges in Porto Rico, Cuba, and the Philippine Islands. The applicants seek to secure the rights usually granted for mining purposes. These applicants being without knowledge of how to proceed, and desirous of retaining exclusive knowledge of their discoveries and the location of the minerals, do not attempt to institute proceedings, but apply to the Department for instruction. Heretofore reply has been made that the questions involved had not yet been determined by the Secretary of War.

The recent law of Congress approved April 12, 1900 (31, U. S. Stats., 77), divests the War Department of jurisdiction over the affairs of civil government in Porto Rico, and by appropriate provisions confers the power of regulating the disposal of the public property in the island, of the character under consideration, upon the civil government created by said law. (Sec. 13, "Foraker Act.")

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not been agreed upon in advance *and the work has been executed*, an implied promise will be raised to pay the reasonable value of the services or supplies, and the *proper officer* may thereafter agree with the other party as to said reasonable value.

I see no reason in drawing a distinction between a case where part of a contract is expressed and part implied and a case where all of the contract is implied, provided an implication of a contract can and does arise and in fact exists. If all of the elements necessary to constitute a binding contract actually exist, *and the property is actually taken by the Government for the use of the Army*, I see no reason why the amount may not be liquidated by you and the amount thereof paid in the same manner as would be done where part of the contract was expressed and part implied.

The question whether the mere taking of private property for use of the Army, with or without the consent of the owner, from a citizen of the United States or an alien, in a hostile country, in and with which the United States is at war, in the presence of contending military forces, shall be considered as an act of *appropriation* for which the United States would not be liable, or as raising an implied contract for the purchase of and payment for the property taken, is one requiring the most careful consideration and application of the legal principles governing such cases. Whether an implied contract could arise in such cases is a matter involved in much doubt, there being many decisions of courts and the accounting officers on the subject indicating a strong leaning, to say the least, against the validity of such claims. In view of the importance of this matter and the uncertainty surrounding it you may deem it wise to transmit such claims to the Auditor for the War Department for settlement, after you have made such examination thereof as you desire to make and ascertained the value of the property taken, instead of having the claims paid by a disbursing officer with a liability of having said payments disallowed in the settlement of the officer's accounts.

Respectfully,

L. P. MITCHELL,  
Assistant Comptroller.  
J. D. T.

Therefore this report will be confined to the questions relating to the island of Cuba and the Philippine Archipelago. It appears that the military government in Cuba has seen fit to continue the granting of mining claims in that island upon compliance with the provisions of the mining law as existing prior to the American occupation. The order of the military government in regard thereto is as follows:

No. 53.

HEADQUARTERS DIVISION OF CUBA,

*Habana, February 8, 1900.*

The military governor of Cuba directs the publication of the following order:

The right to denounce, and, after compliance with the conditions prescribed by law, to acquire title to a mining claim in the island of Cuba, is a right assured by the provisions of the mining law as it existed in Cuba prior to the American occupation and as it has continued to be in force since.

In availing themselves of this right Cubans and foreigners alike merely exercise a universal right conceded to citizens of all countries. The fact that, in the exercise of this right, exclusive ownership of the mining property results, is not sufficient to bring mining claims within the terms of the Foraker resolution prohibiting the granting of special concessions or franchises in the island of Cuba during the continuance of American authority over the island.

To hold otherwise would be to hold that by a provision appended to an appropriation bill, passed by the Congress of the United States, the law of the land for the island of Cuba could be modified to the serious prejudice of many individuals, Cubans and foreigners alike; and there is no reason to believe that it was the intention of Congress to withdraw the rights and privileges previously existing in Cuba. Such action would be positively detrimental to the interests of the island in the highest degree.

It is believed, therefore, that it is merely a ministerial duty on the part of civil governors of provinces to execute and deliver deeds to mining claims when the same have been properly denounced, and all the conditions prescribed by the mining laws have been complied with by the locators.

ADNA R. CHAFFEE,

*Brigadier-General, Chief of Staff.*

I am not able to learn that an order of like purport has been issued by the military government in the Philippines. Inquiry at the office of Colonel Edwards, the Chief of the Division of Customs and Insular Affairs, was answered that the only information had was the following order:

GENERAL ORDERS, }  
No. 31.

OFFICE OF THE UNITED STATES  
MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS,

*Manila, P. I., March 10, 1900.*

The mining bureau (inspección general de minas), heretofore administered as a bureau of dirección general de administración civil, is hereby reestablished and placed in charge of First Lieut. C. H. Burritt, Eleventh Cavalry, United States Volunteers, who will receipt to the chief engineer officer of the department for all records, documents, and property pertaining to said bureau.

By command of Major-General Otis:

M. BARBER,

*Assistant Adjutant-General.*

If the Secretary of War has authorized or approved the policy whereby grants of mining claims are made in Cuba and the Philippines by the existing governments therein, the consideration of this report is unnecessary, and the answer to the interrogatories under consideration is obvious. However, as these letters of inquiry have been referred to me for a report, I assume that the questions involved have not been finally determined by the Secretary of War, and therefore the investigation is continued.

Under Spanish law, mineral in a natural state belongs to the Crown. Therefore, so much of said mineral in the territory involved as the Crown then retained passed to the United States as a result of the war and the treaty of peace.

Attorney-General Griggs, in opinion on the application of Frederick W. Weeks to construct a wharf at Ponce, Porto Rico, delivered to the Secretary of War July 26, 1899, says:

If constructed, the pier or wharf will be upon the public domain of the United States. I understand that under Spanish law lands under tide water to high water-mark in ports and harbors in the Spanish West Indies belonged to the Crown. As Crown property they were, by the treaty of cession, transferred by Spain to the United States of America, and are now a portion of the public domain of that nation. I do not know of any right or power which the Secretary of War or the President has to alienate in perpetuity any of the public domain of the United States, except in accordance with acts of Congress duly passed with reference thereto. There is no legislation by Congress made for or properly applicable to the public domain in Porto Rico. The power to dispose permanently of the public lands and public property in Porto Rico rests in Congress, and in the absence of a statute conferring such power can not be exercised by the executive department of the Government.

I am unable to see why the disposition of public property in the Philippines, of which the United States Government is the proprietor, should be governed by a different rule than is applied to public property in Porto Rico.

The reason for the rule announced by the Attorney-General does not apply with equal force to the conditions existing in Cuba. As to public property in Porto Rico and the Philippines, the United States received title as *proprietor*, but in Cuba the United States received title as *trustee*. It does not seem probable that the existence of the trust increases the power of the Executive and the Secretary of War in the matter of alienating said trust estate. (See opinion of the Attorney-General delivered to the President September 9, 1899, as to power of local authorities of the Hawaiian Islands to dispose of portions of the public domain. 22 Op. 574.)

In the opinion above referred to, the honorable Attorney-General holds that the public lands and other public property in the Hawaiian Islands can not be disposed of except upon provision therefor by Congress, for the reason that the fee title to said property is in the United

States, although burdened with a trust in favor of the people of the island, and the existence of the trust does not change the rule.

It is a general rule of property that title attaches somewhere to some one. That is to say, title does not, like Mahomet's coffin, hang in mid-air. It is apparent that the title to public property in Cuba has not passed to the sovereignty inherent to the people of Cuba, for that sovereignty is dormant and incapable of acquiring title.

It would seem to follow that the correct theory is that the fee title to the public property in Cuba passed to the United States, burdened with a trust in favor of the future permanent government of Cuba. If the fee is in the United States, then, without regard to the burdens attached to the fee, the authority to dispose thereof is vested in Congress.

The situation is the same as though the United States held the title to land in some other foreign country or territory belonging to another recognized sovereignty. In order to alienate said property, the action of Congress must be had.

Granting that Congress has not authority to legislate for the civil government of Cuba does not weaken the theory advanced. There is a vast difference between owning property in a country and exercising the right to regulate the government of the civil affairs of the inhabitants of the country.

An illustration may serve to make clear the point I have in mind. When a permanent government of civil affairs has been erected in Cuba, the transfer of the affairs now in the hands of the intervening government may be accomplished by the present officials, who will relinquish said affairs and place them in the hands of the officials of said new government. But can the transfer of the title to the public property in the island now held by the United States be accomplished in the same way? Will a deed from the military governor of the island divest the United States of its title? It seems to me that in order to pass the title it will be necessary either for Congress to make the transfer by legislative act or authorize some officer of the executive branch to make the conveyance, or after the new government has been established and recognized, to effect the desired purpose by treaty with the new government.

If a deed from the military governor is not sufficient to complete the title of the *cestui que trust*, it certainly can not convey better title to a stranger.

If the Secretary of War does not agree with the foregoing, and is of opinion that the existing government of civil affairs in Cuba may dispose of public property of this character in the island, the next question is, Shall the military government in Cuba exercise said authority?

In this connection attention is directed to the language used by the



Attorney-General in his opinion as to application of the Commercial Cable Company to land a cable in Cuba and Porto Rico, delivered to the Secretary of War, March 25, 1899. (See 22 Op., 408.)

In all instances heretofore where application has been made to this Government, exercising the temporary control and government of the island of Cuba, for grants or concessions which usually flow from the depository of sovereign power, the Executive Departments have taken the ground that under the circumstances by which the United States came into temporary administration of affairs in Cuba, and in view of the fact that it is the declared purpose of the United States when a stable government shall have been there established to retire from the island and leave the government thereof to the inhabitants, it would be inexpedient to grant such applications except in case of absolute necessity.

\* \* \* \* \*

This cautious and conservative policy is sustained by considerations of prudence, and by a proper regard for the reversionary rights of the future government of the island of Cuba. In affirmation of the executive policy so declared and followed, Congress, by act approved March 3, 1899, directed that no property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States. See act making appropriation for support of the Regular and Volunteer Army for the fiscal year ending June 30, 1899, section 2.

I deem it proper to direct the attention of the Secretary to the fact that the permanent government of Cuba and the local government of the Philippines will necessarily be required to raise revenues for their own maintenance. The amount of taxable property in Cuba and the Philippines is not comparatively large, while the cost of maintaining government therein can not be reduced below a total large enough to require a high tax rate. Many nations (notably England) derive revenue from royalties on certain minerals (usually the precious metals) taken from the earth subject to the sovereignty. Many governments (notably Mexico and Russia) operate mines themselves, utilizing the labor of convicted criminals and sometimes soldiers.

The Spanish Government while exercising dominion in Cuba and the Philippines imposed taxes on almost everything, including the exercise of the most common rights. Ostensibly this was done to defray the necessary expenses of government. Whether the policy resulted from the financial straits of the Crown treasury, the rapacity of Crown officers, or the necessities of local government, we are admonished that the taxable property of these territories do not constitute an inexhaustible fund.

The course pursued by the United States in surrendering control of the output of "money metals," and gratuitously alienating its gold and silver mines, without provision for revenue to the Federal Government therefrom or retaining the right to even require the continued operation thereof, has not escaped criticism. If the United States required that the gold and silver of its mines should be taken out on royalties, and that said mines should be operated to produce even

a fraction of their possible output, the maintenance of the "gold reserve" in our National Treasury would not be a question of issuing bonds to buy back what the Government gave away in a natural state and then coined into money free of charge.

These suggestions are offered to direct attention to the advisability of permitting the permanent government of Cuba to decide for itself what course it will pursue as to the valuable public property in the island known as "minerals."

It does not need to be argued that the officers now conducting the government of civil affairs in Cuba can not dispose of said public property as though it were their private estate. The military government takes the place for the time being of the deposed sovereignty, and administers the government by martial rule. This martial rule is not the absence of all laws and the substitution therefor of the will of a military commander. It is but another method of administering the existing laws. To this end the military government utilizes as many civil agencies as possible, and it is only where there is an absence of the desired civil agency, or the existing civil agency can not cope with the existing emergency, that the military exercises its authority or performs the function. The officers of the United States Army in charge of the military government in Cuba recognize the necessity, in the matter of granting mining claims, of proceeding pursuant to some law. Therefore the order of February 8, 1900 (hereinbefore set forth), declares the laws relating thereto in force under Spanish dominion as continuing under American occupation.

In this connection the attention of the Secretary is directed to the opinion of the Attorney-General on the application of Ramon Valdez for right to use the water power of the River Plata in Porto Rico, delivered to the Secretary of War July 27, 1899, wherein the Attorney-General says (22 Op., 548):

It is well-settled law, and only needs to be stated to be understood, that when public property is ceded by one nation to another its disposition and control are thereafter regulated and governed not by the laws of the ceding nation but by the laws of the new government.

\* \* \* \* \*

Those laws of the former government which have for their object a certain governmental policy, of which character are laws for the disposition of the public domain and the granting of quasi public franchises, rights, and privileges to private individuals or corporations, cease to have any force or effect after the sovereignty of the former government ceased. (*Harcourt v. Gailliard*, 12 Wheat., 523.)

The United States Supreme Court say (*More v. Steinbach*, 127 U. S., 81):

The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. That doctrine has no application to the laws authorizing the alienation of any portions of the public domain, or to officers charged under the for-

mer government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject.

(See also *United States v. Vallejo*, 1 Black, 541; *Ely's Administrator v. United States*, 171 U. S., 230.)

Ordinarily the will of the sovereign regarding the disposal of public property belonging to the United States is to be declared by the Congress. Up to this time the only expression of said will declared by Congress is that found in what is known as the "Foraker resolution," incorporated in the Army appropriation act, approved March 3, 1899, as follows:

SEC. 2. That no property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States.

If the correct theory be that the legal title to this property is in the United States it would seem that, instead of authorizing transfers of said title, Congress had placed a positive inhibition thereon.

Continuing the investigation I take it that the Secretary will desire to be informed as to the provisions of the Spanish law under which the military government in Cuba propose to grant mining rights and privileges.

It seems impracticable if not impossible to submit a *complete* review of the Spanish mining laws, because of the course pursued by the Spanish Government in dealing with the subject.

The general bases of the mining laws and regulations of Spain and its dependencies are the royal orders of July 6, 1859, as amended by royal orders of March 4, 1868. The application of said royal orders was provided for by regulations enacted by the Cortes June 24, 1868. The practical working of the provisions of the several laws was unsatisfactory, and on December 29, 1898, another royal order was issued declaring bases for new mining legislation. The Cortes failed to provide new regulations, and apparently for the purpose of providing for various emergencies which arose, a number of royal orders or decrees were issued during 1869, 1870, 1871, 1872, 1874, 1876, 1877, 1881, 1885, and 1887. (See *Mines and Mining Laws of Latin America*, p. 100, publication of Bureau of Statistics, 1892.)

A collection of these laws, published officially in Habana in 1888, under the title of "Legislacion de minas," forms a quarto volume of 103 pages.

Attention is directed to the following epitome of the mining laws of Cuba and their history, taken from a report to the State Department, made in 1891, by Mr. Otto E. Reimar, then United States consul at Santiago de Cuba, which is the center of the richest mineral district of the island:

As early as 1854 Philip II of Spain made laws controlling the mining industry, and these laws remained in force, or, better said, were the base of all mining laws up to

the year 1825. \* \* \* This law (1825) was found, after it was applied, to be so defective, and in many instances contradictory, that new laws and royal decrees were constantly published. The most important of these is the law of July 6, 1859.

After the Carlist war the Government of Spain considered it a duty to say and do something for the mining industry, and with this object ordered, on February 17, 1875, by royal decree, that new mining laws and regulations should be made and pass the Cortes, even going so far as to publish a base for these laws. It seems that up to the present this has not been effectually done, and the law actually in force now is the one of July 6, 1859, reformed by the ones of March 31, 1868, December 29, 1868, and July 24, 1871.

The law of 1859 must consequently serve as a base. The first chapter of this law devotes itself, reformed by the 1868 law, to the objects which are to be considered minerals. These are: All inorganic, metalliferous, combustible, saline substances; calcareous phosphates, barytina, fluorspar, precious stones, all, whether found in veins or strata, or in whatever other form; this if they are worked in a well-ordered manner, on the surface or under the surface.

*The substances above mentioned belong to the State, and no one can dispose of them without the concession of the Government, given in its name by the governors of the provinces. In order to obtain title to a mine application for ownership, proving the existence of mineral, must be made to the governor of the province.*

This may be done without consent or knowledge of the owner of the land, in case the surface land of the mine should happen to belong to other than the applicant.

Until the governor has given permission to examine the mine, and should other objections be made, the matter may be referred to the ministry within thirty days; no work can be done. This permission is given on the report of the official mining engineer (who must make such report within four months) thirty days after such report.

Should the mine for which ownership is thus asked for be situated on lands belonging to a person or persons other than the applicant for ownership of such mine, such applicant, when he receives his title, must pay the owner of the land its full value and one-fifth more.

*Should the owner of the land object and refuse to sell, or a price can not amicably be agreed upon, he (the owner of the land) may be forcibly ejected or expropriated, being paid for his land a price and one-fifth more, adjusted by three appraisers named, one each by both contending parties and the Government.*

As soon as applicant has thus acquired title to his mine he may erect buildings and works and open shafts to operate it, this always with the approval and inspection of the Government mining engineer.

The fact of acquiring title is published in the official bulletin.

The application for ownership must be accompanied by a surface plan of the mine. This plan must always be multangular in shape, and each mine can not exceed 20,000 square meters in size. (See publication above mentioned, pp. 101, 102.)

It will be seen that by these laws the Government of Spain conferred upon the governor of a province the power to do two things—

1. To alienate the proprietary rights of the Crown in and to minerals in a natural state.
2. To grant the privilege of exercising the sovereign right of eminent domain.

Conceding the Spanish mining laws to be in force in said territories, would the powers conferred upon the Spanish governors for the purpose of rendering said laws effective pass to the officers of the United States Army now in charge of the affairs of civil government in said territories?

In his opinion as to the construction of sewers and pavements in Habana (Dady & Co.), delivered to the Secretary of War July 10, 1899, the honorable Attorney-General says (22 Op. 527):

By well-settled law, upon the cession of territory by one nation to another, either following a conquest or otherwise, \* \* \* those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace, or discretion of the former sovereign would probably be held to be ineffective under the succeeding power. \* \* \* The authority of the power of the Crown and of the Crown officers in such instances did not pass to the officers of the United States, because royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of the treaty of cession or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

In *Mumford v. Wardwell*, 6 Wall., 435, the United States Supreme Court say:

Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. Municipal authority also was exercised for a time by subordinate officers appointed by our military commanders. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the department. By virtue of that supposed authority Gen. S. N. Kearney, March 10, 1847, as military governor of the Territory, granted to the town of San Francisco all the right, title, and interest of the United States to the beach and water lots on the east front of the town included between certain described points, excepting such lots as might be selected for Government use.

\* \* \* \* \*  
But the power to grant lands or confirm titles was never vested in our military governors, and it follows as a necessary consequence that the grant as originally made was void and of no effect. Nothing passed to the town by the grant, and of course the doings of the alcalde in selling the lot in question was a mere nullity.

If the mineral is on the surface, or beneath it, of land owned by a private person, it would be necessary to secure the permission of the owner to enter upon his land and disturb the soil or to divest him of the right to object. The divestment may be accomplished by an exercise of the right of eminent domain. This right is a sovereign right. An individual or association exercising it does so as the agent or representative of the sovereign. (4 Thompson Com. on Corp., ch. 122.)

The Spanish mining laws provide for the exercise of this sovereign right of Spain. They constitute a regulation governing a royal prerogative. Where the sovereignty of Spain does not attach, the prerogative can not be exercised unless the prerogative passes to the sovereignty in possession. The United States Supreme Court say:

It can not be admitted that the King of Spain could, by treaty or otherwise, impart to the United States *any* of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. (*Pollard's Lessee v. Hagan*, 3 How., 225.)

Undoubtedly the United States may exercise the power of expropriation, but the right to do so is inherent in its own sovereignty. It is not *derived* from any other sovereign, prince, or potentate, nor acquired by cession of territory. If this inherent power of the United States is exercised in Cuba or elsewhere it must be by virtue of its own sovereignty or not at all. Under the changed conditions existing in Cuba the right can not be exercised by virtue of the sovereignty of Spain.

This brings us to the question: Has the Executive or the Secretary of War the authority to grant to individuals or associations the privilege of exercising the sovereign power of the United States to expropriate private property in Cuba?

I am not aware that this exact question has yet been submitted to the Attorney-General or that he has rendered an opinion which furnishes a specific answer thereto.

The Congress has not legislated with special reference to the exercise of this right in Cuba, and enactments regulating its exercise in the United States are not of force and effect in Cuba. Therefore the President does not possess this authority by virtue of being the Chief Executive of the laws of the United States.

There is another aspect of the matter under consideration which requires attention. That is the authority of the Commander in Chief of the military forces now engaged in the military occupation of Cuba and conducting a military government therein. If the commander of this military force may properly exercise the rights of a belligerent, he derives therefrom authority to dispose of public property and expropriate private property as his judgment may determine is best calculated to promote the purposes of the military operation. If deemed necessary for the accomplishment of the undertaking to which the military force has been devoted, a belligerent commander would have the same justification in disposing of a mine that he would have in blowing up a fort or destroying a bridge.

The vital question is, May the commander of the military forces engaged in the military occupation of Cuba exercise the rights of a belligerent under the conditions existing in the island? Is not this question to be answered by propounding another: Are the purposes for which the military force was sent into Cuba accomplished or abandoned, and if not, may not the military force continue to exercise the rights of a belligerent until said purpose is accomplished or abandoned?

In investigating these questions, it is necessary to bear in mind that the President, in his relation thereto, is not to be considered as a civil magistrate of the United States discharging his duty within the territory of the United States. He is to be considered as the Commander in Chief of the Army and Navy, personally present at the head of his troops in a foreign country. This unusual spectacle is occasioned by

the fact that Congress, in the exercise of the great sovereign powers possessed by the United States as a nation, directed the Commander in Chief of our military forces to employ the military branch of our Government—

1. To compel Spain to relinquish sovereignty in Cuba.
2. To effect the pacification of the island.
3. To enable the inhabitants of Cuba to establish and maintain a stable, independent government.

These purposes were declared, and the order for their accomplishment issued to the Commander in Chief by the adoption of the following resolution:

JOINT RESOLUTION for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own border, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating as they have in the destruction of a United States battle ship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and can not longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* First. That the people of the island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

Approved April 20, 1898. (30 U. S. Stats., pp. 738, 739.)

Let us suppose that the Crown of Spain had seen fit to peaceably relinquish sovereignty in Cuba and turn over its subjects in the island, their personal and property rights, and the public property belonging to the Spanish Government situate in Cuba, to the care of the United States, relying upon the declaration of Congress that the United States would accomplish the pacification of the island and erect therein a stable, independent government. Would not the Commander in Chief of the military force charged with carrying out such declaration rightfully exercise such powers of a belligerent as were necessary to accomplish the undertaking?

Instead of pursuing the course supposed Spain elected to go to war. Congress thereupon declared the war existing by the passage of the following act:

AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect.

Approved, April 25, 1898. (30 U. S. Stats., p. 364.)

As directed to do by this act, the Commander in Chief of the Army and Navy proceeded to carry on the war so declared to exist, and compelled Spanish sovereignty to withdraw from Cuba and the Government of Spain to sue for peace. This war was a mere incident to the accomplishment of the purposes declared by the Congressional resolution of April 20, 1898. It was an obstacle encountered by the Commander in Chief in carrying out the order given him by Congress in said resolution. But said order was not complied with nor the work ended to which the people of the United States had devoted the Army and Navy when Spanish sovereignty was expelled. The pacification of the island was yet to be effected. The prejudices, animosities, hatreds, and strifes resulting from many years of internal warfare were to be allayed, and the inhabitants molded into a homogeneous body on which the foundations of a nation might rest and thereafter a government constructed which would give to the island and its inhabitants peace, prosperity, and the largest degree of liberty consistent with the maintenance of individual rights and collective tranquillity.

As from time to time the sovereignty of Spain was forced to abandon the various sections of said island, and the territory became subject to military occupation by the forces of the United States, there was established a government of civil affairs in said sections whereby was maintained the protection of individual and property rights for which governments are established. Eventually said government extended over the entire island. Such a government is termed a military government, and the duty to establish it is incumbent upon the commander of the military forces, who effects a military occupation.

Military government is the dominion exercised by a belligerent power over invaded territory and the inhabitants thereof. Such a government performs its functions and discharges its obligations by what is known as martial law.



Chief Justice Chase describes military government as a form of military jurisdiction,

to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents. (Ex Parte Milligan, 4 Wall., 141.)

In this case Chief Justice Chase defined martial law as an authority called into action, when public necessity required it, in a locality or district not of an enemy's country, but of the United States, and *maintaining adhesion to the National Government*. (4 Wall., 142.)

By the expression "maintaining adhesion" I understand the Chief Justice to mean continuing within the sovereignty.

It will be seen that a military government takes the place of a suspended or destroyed *sovereignty* and of necessity continues until a permanent sovereignty is again established in the territory.

In Cuba a permanent sovereignty is not established, and therefore the military government continues.

That military government may legally continue *in bello cessante* equally *in flagrante bello* was the substance of the holding in *Lamar v. Brown*, 92 U. S., 187, 193 et seq. (See also *Leitensdorfer v. Webb*, 20 How., 176; *Dow v. Johnson*, 100 U. S., 168; *Texas v. White*, 7 Wall., 700; *The Grapeshot*, 9 Wall., 132; *Burke v. Miltenburger*, 19 Wall., 524; *Lewis v. Cocks*, 23 Wall., 469; *Mechanics' Bank v. Union Bank*, 22 Wall., 276; *Pennywitt v. Eaton*, 15 Wall., 382.)

In discussing this phase of military government Pomeroy says:

"Military government" is the authority by which a commander governs a conquered district when the local institutions have been overthrown and the local rulers displaced and before Congress has had an opportunity to act under its power to dispose of captures or to govern territories. This authority, in fact, belongs to the President; and it assumes the war to be still raging and the final status of the conquered province to be undetermined, so that the apparent exercise of civil functions is really a measure of hostility. "Martial law" is something very different. It acts, if at all, within the limits of the country against civilians who have not openly enrolled themselves as belligerents among the forces of an invading or a rebellious enemy. (Pomeroy's Constitutional Law (Bennett's 3d ed.) par. 712, p. 595.)

Birkhimer says (p. 290):

The experience of the United States Government but adds to the evidence derivable almost universally from the history of other nations that military government ceases at the pleasure of him who instituted it upon such conditions as he elects to impose, and that its termination is not in point of time coincident, either necessarily or generally, with the cessation of hostilities between the contending belligerents.

The course pursued by the United States at the close of the civil war establishes the acceptance by this nation of the doctrine that military government may continue after the close of hostilities and until the purposes for which the war was entered upon, or rendered obvious by the war, are accomplished, and to this end may exercise the rights of a belligerent. As regards private rights, the civil war ended August

20, 1866. (*McKee v. Rains*, 10 Wall., 22; *United States v. Anderson*, 9 Wall., 561; *McElrath v. United States*, 102 U. S., 426.)

As regards public matters, there were two proclamations made by the President declaring that the war had closed—one, issued April 2, 1866 (14 Stat. L., 811), embracing all the late rebellious States excepting Texas; and the other, issued August 20, 1866 (14 Stat. L., 814), embracing Texas.

The Executive undertook to place the States which had engaged in the rebellion on a footing of equality with the other States of the Union. Congress antagonized this position and passed what are known as the "reconstruction acts." (14 Stat. L., 428; 15 Stat. L., 14.) These acts provided for military government, possessing sovereign powers, to be exercised by martial rule in the several States mentioned. For this purpose said act required:

That said rebel States shall be divided into military districts and made subject to the military authority of the United States. (14 Stat. L., 428.)

The powers given to the district commanders were as follows (sec. 3, chap. 30, 14 Stat. L., 426):

SEC. 3. *And be it further enacted*, That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void.

The reason for such government was declared by the preamble as follows:

Whereas no legal State governments or adequate protection for life or property exist in the rebel States of [naming them]; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be established, therefore.

If such reasons were sufficient to justify the continuance of belligerent rights in the military government of territory subject to the sovereignty of the United States and within the territorial boundaries of the United States, are they not equally potent in the instance of Cuba?

The Supreme Court refused to interfere with the enforcement of said reconstruction acts or the exercise of the authority conferred thereby. (*State of Mississippi v. Johnson*, 4 Wall., 475; *State of Georgia v. Stanton*, 6 Wall., 50; *Handlin v. Wickliffe*, 12 Wall., 174; *White v. Hart*, 13 Wall., 646.)

The court held that this legislation was political in character and therefore outside the jurisdiction of the judicial department; that in creating such legislation Congress exercised certain of the sovereign

powers of the nation which exist, but are reserved to the people by the Constitution. No one ever claimed that the government created by this legislation was that provided for by the Constitution of the United States for the States of the Union. It found its legal justification in being an exercise of the inherent right of national sovereignty to adequately deal with a national emergency.

The situation then existing is thus described by Birkhimer:

But it was also true that the civil governments in the late insurrectionary States were inimical to the Union; that society there was in a dangerously disordered condition; that deep-seated enmity was at this period entertained by the leading people toward important principles of governmental policy which those who had saved the Union had resolved should be incorporated into the Constitution. (XIV amendment.) Technically it might be termed "time of peace," but in reality it was far different, as that phrase is generally understood. (Military Government and Martial Law, 1 ed., p. 388.)

In Texas the military government installed under the reconstruction acts continued until April 16, 1870. Prior to the passage of the reconstruction acts in 1867, the people of Texas called a constitutional convention which convened on February 7, 1866, and so amended the constitution of the State as to meet the changed condition of affairs brought about by the result of the war and the fourteenth amendment to the Constitution of the United States. These amendments were ratified by the people. All officers provided for by the State constitution were elected and entered upon the discharge of their respective duties. The legislature met and passed laws, and the State government was again administered by officers holding under the terms of the constitution; all the courts were held by judges elected as the constitution prescribed, and county and municipal officers selected in the same manner entered upon the discharge of their duties. But the reconstruction act of March 2, 1867, declared that no legal State government existed in Texas, and provided further for the military government of said State. The officers elected under the constitution were removed from office and others appointed in their places. Among them, the governor of the State, elected under the constitution as amended in 1866, was displaced, and a provisional governor was appointed and held the office until September 30, 1869, when he resigned, and from that time until January 8, 1870, the executive duties were performed by an adjutant of the general in command, placed in charge of civil affairs. On April 16, 1870, by General Order No. 74, the military commander declared the State had resumed practical relations to the General Government, and all the authority conferred upon him by the reconstruction laws was remitted to the civil authorities.

Speaking of the powers exercised by the military officer in command of Texas, the supreme court of Texas say:

In Texas this officer exercised powers legislative and executive, if not judicial. (Daniel v. Hutcheson, 86 Texas, 57.)

In the same case the court say:

That the State was governed by military law, even though its own laws may to some extent have been recognized and administered, must be considered an established fact.

The power of the United States Government to impose such a rule upon the State must be recognized as fully, under the facts existing, as though Texas had theretofore been an independent sovereignty, having no relation to the United States than that usually sustained by one independent nation to another.

Civil war had existed of magnitude seldom exceeded, resulting in the overthrow by force of arms of the cause the State had espoused, and the occupation of her territory by a hostile army.

This occupancy was continued, and under the laws of war furnished ground for the establishment of military law. (86 Texas, p. 60.)

In another case the supreme court of Texas, in speaking of the reconstruction acts, say:

The National Legislature used its legitimate powers with moderation and magnanimity, endeavored to encourage the formation of republican governments in these States, and bring the people back to a due appreciation of the law and of the liberty which is secured to the free enjoyment of every citizen under the Constitution. (33 Texas, 570.)

The inherent powers of sovereignty whereby military government was installed in the territory of the rebellious States were exercised by Congress. But the authorities hereinbefore cited, as well as the recognized laws of war and usages of nation, establish that said sovereign powers may also be exercised by the commander in chief of the military forces. Especially is this true while the condition of war, i. e., the national necessity for its exercise, continues.

In the instance of Cuba, its exercise by the Commander in Chief necessarily results from the direction given to that officer by the resolution of Congress of March 20, 1898. Whether or not Congress can now recall this authorization need not be discussed, as Congress has not attempted to do so. The situation in Cuba is quite different from that resulting in Porto Rico from the cessation of hostilities and the treaty of peace. Porto Rico was not within the contemplation of the Congressional resolution of March 30, 1898. The invasion, military occupation, and military government of that island resulted entirely from the war, and not the direction of Congress. By the terms of the treaty of peace the sovereignty of the United States permanently attached to the territory of the island, and when the war ended the military government erected in the island ceased to be a *substitute* for a sovereignty and became the representative of the sovereignty of the United States, and charged with the *protection* rather than the *direction* of sovereignty.

If the doctrine is correct that a military government is a substitute *ad interim* for sovereignty, and that the purposes of the one erected in Cuba are uncompleted, and to promote said purposes the Commander

in Chief may exercise the rights of a belligerent, it follows that said government may dispose of the public property within its jurisdiction and exercise other powers of sovereignty, when necessary for the purposes to be accomplished. The questions involved in such exercise are ordinarily to be resolved by the military commander.

In the instance of public property in Cuba, the doctrine of *postliminy* is not involved. That doctrine deals with the rights of the previous owner, and the rights of the previous owner of the public property in Cuba were disposed of by the treaty of peace. Aside from the question of military necessity, the questions involved relate to the inchoate rights of the nonexistent independent government of Cuba and the duties and obligations of the United States resulting from the relation of trustee and *cestui que trust*.

If the Commander in Chief shall be of the opinion that to accomplish the pacification of Cuba and the establishment of a stable, independent government in the island it is necessary to develop the natural resources thereof, and to that end shall determine to provide for the working of mines by private enterprise, it will be necessary to find out, before recourse is had to such plan, if such action is prohibited by Congress by the "Foraker resolution." For its more convenient examination said resolution is set forth in full (see 30 Stat. L., 1074):

SEC. 2. That no property, franchises, or concessions of any kind whatever shall be granted by the United States or by any military or other authority whatever in the island of Cuba during the occupation thereof by the United States.

Approved March 3, 1899.

With reference to the foregoing enactment the Attorney-General says:

While not meaning to concede that Congress, by legislative act, has power to restrain or control the proper exercise of the powers of the Commander in Chief of the Army and Navy of the United States, occupying under the law of belligerent right foreign territory—a question that may well be open to doubt—yet the expressed will and desire of the Congress, conforming as it does to the previously established policy and practice of the Executive Departments, is entitled to the respect of the Executive Departments, and ought to be followed, unless some high necessity requires otherwise. (Op. on App. of Cable Co. to land cable in Cuba, March 25, 1899. 22 Op. 410.)

The doubt suggested by the honorable the Attorney-General applies with special force to the prohibition against grants "by any military or other authority whatever in the island of Cuba."

Attention is directed to the fact that the "Foraker resolution" was passed March 3, 1899. This was during the interim between the protocol of August, 1898, and the exchange of ratifications of the treaty of peace in April, 1899. Technically, the war with Spain was not ended, and the opposing forces were still belligerents. This presents the question of the authority of Congress to direct and control the action

of the Commander in Chief regarding matters incident to carrying on military operations of an actual war waged in a foreign country.

Bennett's Edition of Pomeroy's Constitutional Law (3d ed.) lays down the rule as follows:

This military law, or, in other words, this code of positive, enacted, statutory rules for the government of the land and naval forces, is something very different from martial law, which, if it exists at all, is unwritten, a part and parcel of the means and methods by which the Commander in Chief may wage effective war, something above and beyond the jurisdiction of Congress; for that body has no direct authority over the actual conduct of hostilities when war has been initiated. (Sec. 469, p. 385.)

The same author further says:

When actual hostilities have commenced, either through a formal declaration made by Congress; or a belligerent attack made by a foreign government which the President must repel by force, another branch of this function as Commander in Chief comes into play. He wages war; Congress does not. The Legislature may, it is true, control the course of hostilities in an indirect manner, for it must bestow all the military means and instruments; but it can not interfere in any direct manner with the actual belligerent operations. Wherever be the theater of the warlike movements, whether at home or abroad, whether on land or on the sea, whether there be an invasion or a rebellion, the President as Commander in Chief must conduct those movements; he possesses the sole authority and is clothed with the sole responsibility. (Sec. 706, p. 591.)

Chief Justice Chase, in the minority opinion in *Ex Parte Milligan*, said (4 Wall., 139):

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns*. That power and duty belong to the President as Commander in Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, *nor Congress upon the proper authority of the President*.

In the case of *Brown v. United States* (8 Cranch, 110) the United States Supreme Court held that during the war of 1812 the private property of English subjects situate in the United States at the commencement of hostilities could not be seized by a private citizen and condemned by proceedings in admiralty instituted on behalf of the individual making the seizure. In the statement of facts the court say:

It does not appear that this seizure was made under any instruction from the President of the United States; nor is there any evidence of its having his sanction. \* \* \* On the contrary, it is admitted that the seizure was made by an individual and the libel filed at his instance by the district attorney, who acted from his own impressions of what appertained to his duty. (Pp. 121, 122.)

The court held that the *nation* had the undoubted right to seize and confiscate such property, but such sovereign right could not be exercised by individuals or the courts in the absence of authorization by Congress.

In writing the opinion of the court Mr. Chief Justice Marshall says (pp. 122, 123):

Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less effect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation the judicial department must give effect to its will.

In expressing his individual opinion in that case Mr. Justice Story said (p. 152):

The act declaring war has authorized the Executive to employ the land and naval forces of the United States to carry it into effect. When and where shall he carry it into effect? \* \* \* Upon what ground can he authorize a Canadian campaign, or seize a British fort or territory, and occupy it by right of capture and conquest, I am utterly at a loss to perceive, unless it be that the power to carry the war into effect gives every incidental power which the law of nations authorizes and approves in a state of war.

Continuing the discussion, Justice Story says (pp. 153, 154):

My argument proceeds upon the ground that when the legislative authority, to whom the right to declare war is confided, has declared war in its most unlimited manner, the Executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him as to the manner and extent, but he can not lawfully transcend the rules of warfare established among civilized nations. He can not lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, as to declaring war and limiting its effects, rests with the Legislature. The sovereignty, as to its execution, rests with the President. If the Legislature do not limit the nature of the war, all the regulations and rights of general war attach upon it.

The authority under examination is not that of confiscation. Confiscation of this property would be to dispose of it and apply the proceeds to the use and benefit of the United States. Such a course is not contemplated, the desired object being to so use the public property of Cuba as to best promote the general good and future welfare of the island, the practical question being whether the present and continuing benefits of certain action will compensate the future government for the loss of the property. Ordinarily the commander of a force engaged in military occupation does not undertake to dispose of public property of a permanent character. This arises not from the want of authority to dispose of the title secured by invasion, but from the fact that the tenure is so unstable, being dependent upon the power to continue the occupation.

In the instance under consideration the title secured by military

occupation has been confirmed by treaty with the prior owner. If the property is alienated by an exercise of sovereignty under belligerent right, the person accepting the title may be protected by requiring the future permanent government of Cuba to accept the public property in the island burdened with such conditions as the United States has seen fit to impress upon it during the period it administered thereon.<sup>a</sup>

In view of the reconstruction acts it can not be said that Congress has not exercised the authority to create and regulate military governments maintained as war necessities.

In the several cases in which these acts were assailed, the Supreme Court declined to pass upon the right of Congress to enact such legislation, basing its refusal upon the proposition that such legislation was entirely and exclusively political, and, therefore, without the jurisdiction of the courts. The unfortunate controversy between the Executive and Congress which occasioned such legislation is too well known to require statement.

Congress insisted, and properly so, that the Executive had exceeded his powers and encroached upon the powers of the legislative branch in attempting to provide for the permanent civil government of the territory subject to military occupation and to adjust or establish the permanent political relations of said territory to the United States.

It is not so apparent that in resisting said encroachment Congress did not invade the province of the Executive and exercise powers properly belonging to the President as Commander in Chief of the Army and Navy when it assumed direction and control of the military governments and legislated therefor.

That the sovereignty of the United States may create and maintain such governments, under proper conditions, is beyond controversy. Which instrument of said sovereignty—the Executive or the Legislative—is to exercise such power of the sovereign is by no means so well settled.

From the authorities hereinbefore cited it appears that the Supreme Court has affirmatively declared that the President as Commander in Chief may properly exercise said sovereign power. As to the correctness or propriety of such exercise by Congress, the court considers itself without jurisdiction to determine.

There are potent reasons why Congress should not exercise this power, even if it possesses the right, but they are properly to be addressed to the discretion of the Legislature, and to discuss them herein would unnecessarily expand a report already unduly extended.

In the foregoing report administrative questions have been discussed with a liberty not possessed by the writer and ordinarily not

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<sup>a</sup>See Platt resolutions respecting the Constitution of Cuba, 31 Stat. L., p. —.



to be exercised by him, but it seems unavoidable in properly presenting the questions involved.

The questions discussed in the foregoing report were referred to the Attorney-General, who rendered an opinion thereon as follows:

DEPARTMENT OF JUSTICE,  
*Washington, D. C., September 8, 1900.*

SIR: I have the honor to acknowledge the receipt of your communication of August 7, 1900, submitting for my opinion the following questions:

"1. Did the Spanish mining laws continue in force in Cuba by virtue of the laws of war and of nations after the American occupation of the island?

"2. May the military government in Cuba continue the granting of mineral claims in that island upon compliance with the provisions of the mining law as existing prior to the American occupation?

"3. Did the powers possessed by the Spanish officials for the administration of said laws pass to the officers of the existing military government; that is to say, may the present civil governors of the existing provinces of Cuba alienate minerals in a state of nature in Cuba by executing and delivering deeds to mining claims pursuant to the Spanish laws?

"4. Has the military government of Cuba the right to confer upon an individual the privilege of exercising the right of eminent domain by virtue of the Spanish law regulating the exercise of said right in connection with mines and minerals?

"5. May the President of the United States, as Commander in Chief of the Army and Navy, now exercise the power of legislation and provide for the alienation of minerals and the creation of mining rights in Cuba?

"6. May the President delegate such right of legislation to the Secretary of War, the military governor of Cuba, or other officer of the military government of the island?

"7. Are similar questions arising in the Philippines to be governed by the rules applicable to those arising in Cuba?"

Accompanying your letter is a report from Charles E. Magoon, esq., law officer of the War Department, Division of Insular Affairs, in which the laws of Spain prevailing in Cuba prior to the relinquishment of sovereignty therein by the treaty of Paris are stated. Assuming this statement of Spanish law to be correct, then all inorganic, metalliferous, combustible, saline substances, calcareous phosphates, barytina, fluor spar, precious stones, whether found in veins or strata, or in whatever other form, belonged to the Spanish Crown, and no one was authorized to dispose of them without the concession of the Spanish Government given in its name by the governors of the provinces.

The method of obtaining title to a mine under Spanish law is set forth as follows:

"In order to obtain title to a mine, application for ownership, proving the existence of mineral, must be made to the governor of the province.

"This may be done without consent or knowledge of the owner of the land in case the surface land of the mine should happen to belong to other than the applicant.

"Until the governor has given permission to examine the mine (and should other objections be made, the matter may be referred to the ministry within thirty days) no work can be done. This permission is given on the report of the official mining engineer (who must make such report within four months) thirty days after such report.

"Should the mine for which ownership is thus asked for be situated on lands belonging to a person or persons other than the applicant for ownership of such mine, such applicant, when he receives his title, must pay the owner of the land its full value and one-fifth more.

"Should the owner of the land object and refuse to sell, or a price can not amicably be agreed upon, he (the owner of the land) may be forcibly ejected or expropriated, being paid for his land a price and one-fifth more, adjusted by three appraisers named, one each by both contending parties and the Government.

"As soon as applicant has thus acquired title to his mine he may erect buildings and works, and open shafts to operate it, this always with the approval and inspection of the Government mining engineer.

"The fact of acquiring title is published in the official bulletin.

"The application for ownership must be accompanied by a surface plan of the mine. This plan must always be multangular in shape, and each mine can not exceed 20,000 square meters in size."

It thus appears that mines, minerals, and mining rights in Cuba were vested in the Crown, and that the granting of mining or mineral rights to an individual was an exercise of the imperial prerogative. When Spain relinquished her sovereignty in Cuba she parted with all the royal prerogatives. The laws which theretofore had governed the exercise of prerogative rights of the Crown of Spain did not pass to the successors in sovereignty, whether such successors be considered the United States of America as trustees for the pacification of the island or the people of Cuba in a congregated sense. (See *Mumford v. Wardwell*, 6 Wallace, 435; *Pollard's Lessee v. Hagan*, 3 Howard, 225; *Harcourt v. Gaillard*, 12 Wheaton, 523. See also, 22 Opinions, 514, 521, 546, 551.)

I am of opinion that under the principle of these decisions and of the opinions heretofore rendered by me that have been referred to, the Spanish mining laws were not continued in force in Cuba by virtue of the laws of war or of nations, or according to any other principle of jurisprudence, after the American occupation of the island.

The possession of Cuba was wrested by the United States from Spain by force of arms, under the constitutional direction of the President of the United States as Commander in Chief of the Army and Navy, in pursuance of the joint resolution of Congress passed April 20, 1898. This resolution declared "that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." Both by the rules of public law that apply to foreign territory seized and held as a conquest and by the terms of the resolution of Congress the United States, upon taking possession of the island, rightly entered upon the exercise of sovereignty, jurisdiction, and control over said island. All the usual incidents of sovereignty and jurisdiction pertain to the military occupation originally gained by force of arms and now maintained in pursuance of the treaty of peace. It is true that that sovereignty and jurisdiction are exercised by the United States as a trustee for the benefit of the people of Cuba, but the United States has a distinct and well-defined duty and purpose in connection with Cuba, namely, to govern and control the island, to "exercise sovereignty, jurisdiction, and control over it" (to use the language of the resolution) for its pacification. No limitation upon the ordinary power of a conqueror over conquered territory is created by this trust.

The United States is bound, in good conscience, to exercise its temporary sovereignty and control for the benefit of the Cuban people; but as to what acts of sovereignty it will perform, the particular manner in which it will perform them, and the subjects upon which it will permit its sovereign force to operate, the United States, acting through the President as Commander in Chief, is the sole judge. The public property of Cuba, by the treaty of peace, was not vested in the United States as a proprietor, but had theretofore been partly in its possession as conqueror, and the remainder was by Spain delivered over to its possession as conqueror and as trustee for the future benefit of the Cuban people. Cuba, therefore, rightly contin-

ues to be governed under the law of belligerent right and not under the domestic laws of the United States. According to the law of belligerent right, the will of the conqueror supplants the former political laws and powers which prevailed in the conquered territory, and the conqueror may make such new laws, rules, and regulations as he sees fit. (*Brown v. U. S.*, 8 Cranch, 110.) Under this principle it is lawful for the conqueror, in administering the conquered territory, to make such use of the property previously belonging to the former sovereign as he sees fit. There is, therefore, in the President of the United States, acting by virtue of his constitutional authority as Commander in Chief of the Army and Navy, adequate power to use and make disposition of property in Cuba formerly belonging to the Crown of Spain, or subject to the imperial prerogative, and this includes the right to dispose of mining and other property formerly belonging to the Spanish Crown. Whether this power of the President has been adequately conferred upon the military governor or other American officers in Cuba I am unable to say, as I am not furnished with the orders of your Department which have been heretofore issued, but, in my judgment, the President, as Commander in Chief, could authorize the military governor of Cuba to make grants of mining rights, if the President desired to do so.

I beg to suggest, however, that whether such a power should be exercised by the President or be by him conferred upon the military government in Cuba is a question involving important and delicate considerations, in connection with which I call your attention to the language of an opinion rendered by me to your predecessor on the application of the Commercial Cable Company for leave to land its cable on the island of Cuba. (22 Opinions, 408.)

Similar questions arising in the Philippine Islands would not be governed by the same rules applicable to Cuba, for the reason that the Philippine Islands have been ceded to the United States, and whatever property or public rights pertained to Spain at the time of the cession have been transferred to the United States and have become its property and can only be disposed of in accordance with the will of Congress. (22 Opinions, 544, 546.)

Very respectfully,

JOHN W. GRIGGS,  
*Attorney-General.*

THE SECRETARY OF WAR.

By direction of the Secretary of War, the chief of the Division of Insular Affairs on September 17, 1900, transmitted copies of the foregoing report and opinion of the Attorney-General to the military governor of Cuba, the civil governor of the Philippine Islands, and the commander of the United States military forces in the Philippine Islands "for their information."

**THE RIGHT OF MUNICIPALITIES IN CUBA TO GRANT PERMISSION TO RAILROAD COMPANIES TO CROSS OR OCCUPY HIGHWAYS, STREETS, AND PROPERTY BELONGING TO SAID MUNICIPALITIES, AND THE PROCEDURE TO BE FOLLOWED IN CONFERRING SUCH PRIVILEGE.**

[Submitted April 20, 1901. Case No. 2433, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your request for a report on the above-entitled subject, and in compliance therewith I have the further honor to submit the following:

The territory of the island of Cuba is apportioned into political subdivisions called municipalities. These resemble townships in the States of the Union, and taken together include the entire island.

Under the laws of Spain these municipalities were authorized to acquire property the same as individuals, firms, or corporations, and to receive, maintain, and convey title thereto.

Pursuant to such authority said municipalities have acquired title to real property including many highways, streets, squares, lots, and other parcels of ground, of which they were the owners at the time the military occupation of Cuba by the forces of the United States was established.

Under the laws of Spain the affairs of said municipalities were conducted by a municipal council, called the *ayuntamiento*; a headman or mayor, called the *alcalde*, and other officials whose authority and duties corresponded to those of municipal officers in the States of the Union. While Cuba continued under Spanish sovereignty the action of these municipal officials in many matters relating to municipal affairs were subject to the approval of the officers of the general administration of the island, that is to say, the officers of the Spanish Crown exercising the powers of sovereignty over said island. This surveillance was maintained for the purpose of preventing said municipalities from rendering themselves incapable of complying with the requirements of the national Government in the matter of taxes duly imposed, and from interfering with the general purposes of the national Government in matters relating to the general administration of the island.

The military occupation of Cuba by the forces of the United States being effected, the Spanish laws relating to municipalities and municipal affairs were continued in force under the military government, with such modifications as were necessary to adapt them to the new conditions. Upon the withdrawal of Spanish sovereignty it resulted, of course, that the surveillance and authority over said municipalities and municipal affairs theretofore exercised by the Crown of Spain and the officers of the general administration of the island maintained

under Spanish sovereignty ceased. Such authority as was there after to be exercised over municipalities and municipal affairs in Cuba by the officers of the general administration of the affairs of civil government in Cuba is not derived from, dependent upon, nor regulated by the laws of Spain. That authority arises from the laws of war and of nations appertaining to the conditions found to exist in Cuba as the results of a war.

The present incumbents of the municipal offices in Cuba, continued in existence under the military government, were elected thereto by the inhabitants of the several municipalities. (See Order No. 164, Headquarters Division of Cuba, series 1900.)

The laws of Spain relating to municipalities in Cuba are substantially the same as the Spanish laws relating to municipalities in Porto Rico.

President McKinley, in his message to Congress dated December 5, 1899, with reference to Porto Rico, says:

The cities of the island are governed under charters which probably require very little or no change. So that with relation to matters of local concern and private right it is not probable that much, if any, legislation is desirable. (P. 48.)

The President, continuing to speak with reference to Porto Rico, says:

In the municipalities and other local subdivisions I recommend that the principle of local self-government be applied at once, so as to enable the intelligent citizens of the island to participate in their own government and to learn by practical experience the duties and requirements of a self-contained and self-governing people. (P. 50.)

The policy thus recommended by the President to Congress for adoption in Porto Rico was, by direction of the President, adopted and pursued in Cuba. (See Order No. 164, Headquarters Division of Cuba, series 1900.)

The progress made toward the independent administration of their own affairs by the municipalities of Cuba at this date (April 20, 1901) is shown by the following orders from Headquarters Division of Cuba, series of 1900: Nos. 123, 124, 138, 201, 210, 213, 232, 252, 253, 254, 262, 270, 275, 300, 311, 314, 318, 355, 355a, 449, 466, 519.

The situation is, that the powers, rights, and privileges conferred upon municipalities in Cuba by the laws of Spain are found to be proper and right, and are to be exercised and enjoyed by said municipalities, acting by and through municipal agents and officials duly elected by the inhabitants.

One of the first uses made by the municipalities of Cuba of the right to independent action was to petition for increased and improved railway facilities. Perhaps no demand from Cuba has been more insistent than this one. An examination of a map showing the railways in Cuba discloses that there are a number of short lines of road, each

starting from a seaport and extending into the interior. This brings a small area of territory into communication with a seaport; but these roads are not connected with each other and do not afford communication between the cities or different portions of the island. For many years Cuba has been a veritable military camp, wherein Spain and the revolutionary forces engaged in constant military maneuvers. It is apparent, even to a mind unskilled in military matters, that as a military measure it would have greatly benefited Spain had there been in Cuba a system of railroads connecting the different parts of the island and enabling the Spanish Government to easily and rapidly transport troops and munitions of war to such parts as necessity required. I think it is not too much to say that had Cuba been adequately supplied with railroads the insurrection would not have assumed proportions which induced the Spanish Government to resort to measures which justified intervention by the United States.

The material interests of the island, such as the marketing of tropical fruits, transportation of logs and other products of tropical forests, ore, stone, etc., and agricultural products, required railway facilities, not to mention the minor benefits of rapid transportation. During all this time capital, both foreign and domestic, was anxious to engage in railway enterprises in Cuba. During the two years last past I have made numerous inquiries of persons well informed as to affairs in Cuba for the purpose of ascertaining why the Spanish Government declined to permit these short lines to be extended and connected, so as to form a railway system which would furnish adequate railway facilities to the inhabitants of the island. In every instance the explanation given was that the carrying trade of Cuba was in the hands of a Spanish company owning a line of vessels and affording transportation by water; that it was to the advantage of said company to have railroads extending into the interior and bringing merchandise down to the seaports, and to its disadvantage to have said roads so extended and connected as to afford all parts of the island railway communication; and that company possessed sufficient influence at the Spanish court and Cortes to prevent the passage of a special law authorizing said extensions and connections, and without the authority of such special law said constructions could not be attempted. Whether the foregoing explanation of an existing condition is or is not authentic, the fact remains that railway facilities in Cuba are inadequate to the needs of the people, and the traffic of the island is compelled to rely almost entirely upon uncertain and inadequate transportation by water. It is unnecessary to present argument to show that this condition ought not to continue beyond the period of necessity.

In constructing a railroad in Cuba it is necessary to secure right of way over (1) property owned by private individuals, (2) property

owned by municipalities, (3) property heretofore belonging to the Spanish Crown and now held in trust by the United States for the inhabitants of Cuba in their federate capacity.

Ordinarily a railroad company secures right of way over private property by exercising the right of eminent domain; the privilege of so doing being secured from the sovereign power possessing jurisdiction in the given territory.

The President has not seen fit to direct the military government of Cuba to exercise its authority so as to confer upon railroad companies the privilege of employing the right of eminent domain in securing right of way over private property in Cuba. This, however, does not prevent railroad companies from securing such right of way by purchase or other arrangement with the owners of private property.

The matters involved when consideration is given the question of securing right of way over property belonging to a municipality in Cuba are somewhat more complicated.

The property belonging to said municipalities may be divided, generally, into three classes:

1. Property conveyed to the municipality subject to a condition that it shall be devoted to a specified use—such as a site for a church or public edifice. Where the terms of the conveyance to the city or other obligation preclude the exercise of discretion as to the use of said property by the municipality the property must continue to be used in the way and for the purpose contemplated in the dedication.

2. Property owned by the municipality and devoted to certain purposes by the municipality in the exercise of powers of discretion—such as streets, highways, parks, and public squares laid out and maintained by the municipalities. The municipality would ordinarily possess the right to determine and designate to what purposes such property should be devoted and in what manner the purpose was to be carried out, subject to the general right of user possessed by the general public.

3. Property owned by the municipality free and clear of conditions or limitations, and over which the municipality would ordinarily exercise all the rights of absolute ownership.

The investigation of the subject under consideration will be made with reference to such municipal property as may be included in classes 2 and 3.

In the absence of authority to exercise the right of eminent domain, a right of way over municipal property must be secured by voluntary grant of the municipality. Such grant, whether it constituted an easement or an alienation, would be an exercise of the rights of ownership. This raises the question: Do the municipalities of Cuba own the fee of their streets and highways? This question is to be

answered, that some of said streets and highways are owned by the municipality and some of them are not.

The Spanish Civil Code provides as follows:

ART. 339. To the public domain belong: 1. Those intended for public use, as roads, canals, \* \* \* and bridges, *constructed by the State*.

ART. 343. The property of provinces and towns is divided into property of public use and patrimonial property.

ART. 344. Property for public use in provinces and towns comprises the provincial and town roads, the squares, streets, fountains and public waters, the walks, and public works for general service, *paid for by the same towns or provinces*.

The Spanish Code defines "Ownership" as follows:

ART. 348. Ownership is the right to enjoy and *dispose of* a thing, without further limitations than those established by the laws.

Under the provisions of the Spanish law a municipality, by following a prescribed procedure, might burden the public property owned by the town with easements or concessions, or it could alienate it entirely.

On February 27, 1864, the "general directive body in charge of the registers" decided that record is permissible of an instrument whereby a municipal council attempts to alienate, in whole or in part, the lands dedicated to public highways in a municipality. (*Leyes Civiles de España*, Madrid, 1893; *Ley Hipotecaria*, title 1, par. 2, note 2.)

Under the laws of Spain, the register of deeds and conveyances passes upon the title and legal effect of the instrument of conveyance before permitting the registration. If he decides that the title is defective, or the conveyance unauthorized, he refuses registration. Thereupon an action may be commenced against him to compel registration. The action is in the nature of an appeal from the decision of an administrative officer, and, in a measure, resembles a mandamus proceeding. The case above referred to was of this character, and the determination was in favor of the right of the city to alienate its rights to the streets.

Independent of the question of owning the land occupied by the streets and the appurtenant right of alienation, the municipalities of Cuba were, by Spanish law, empowered to regulate and control the use of the streets maintained by them.

A right of way over or along a street often consists of permission to use a portion of said street for railway purposes. Such permission does not ordinarily convey title; it merely permits use in a prescribed manner for a desired object. It is an exercise of the right of regulation and not the right of alienation. The Spanish laws authorized the municipalities of Cuba to grant such permits for the use of streets and highways maintained by the municipalities.

In support of the foregoing statement the attention of the Secretary of War is directed to the following provisions of the Spanish laws.



The municipal laws in force in the island of Cuba under Spanish sovereignty contain the following provisions:

ART. 69. The government and administration of the private interests of towns is under the jurisdiction of municipal councils, subject to the laws, and particularly in all that refers to the following subjects:

First. Establishment and creation of municipal services referring to the arrangement and ornamentation of public roads, comfort, and hygiene of the neighborhood, encouragement of its material and moral interests, and security of persons and property, as follows:

1. Opening and alignment of streets and parks and of all kinds of roads of communication.

2. Paving, lighting, and sewerage.

3. Water supply.

4. Promenades and trees.

5. Bathing establishments, laundries, market houses, and slaughterhouses.

6. Fairs and markets.

7. Institutions for instruction and sanitary services.

8. Municipal buildings and in general all kinds of public works necessary for the fulfillment of the services subject to the special legislation on public works.

9. Surveillance and police.

Second. Urban and rural police—that is, all that refers to the good order and surveillance of the established municipal services; care of public roads in general, and cleanliness, hygiene, and health of the town.

Third. Municipal administration, which includes the use, care, and preservation of all estates, property, and rights belonging to the municipality, and to the establishments depending thereon, and the determination, assessment, collection, investment, and account of all taxes and imposts necessary for the execution of the municipal services.

It is the obligation of municipal councils to construct and keep in repair municipal roads. In so far as rural roads are concerned, the municipal councils shall oblige the persons interested in the same to preserve and repair them.

In order to attain these objects, the proper measures with regard to municipal roads shall be adopted by the board of associates, and with regard to the rural roads by a board of the persons interested.

The governors shall see to the fulfillment of this most interesting part of the administration, by virtue of the powers granted them by the laws.

ART. 70. It is the duty of municipal councils to procure, alone or with the assistance of the members, in the manner hereafter expressed, an exact compliance, in accordance with the means and necessities of the town, of the purposes and services which, according to the present law, are intrusted to their action and surveillance, and particularly the following:

1. Preservation and repair of public roads.

2. Rural and city police.

3. Police for security.

4. Primary instruction.

5. Administration, custody, and preservation of all estates, property, and rights of the town.

6. Charitable institutions.

Municipal resolutions relating to fairs and markets, surveillance, police and security, primary instruction, and charitable institutions require the previous approval of the governor.

In matters which do not come under his jurisdiction they are also obliged to assist the action of the general and local authorities in the fulfillment of that part of the

laws which refers to the inhabitants of the municipal district, or which is to be complied with within the same, for which purpose they shall proceed in accordance with the prescriptions of the said laws and the regulations issued for their execution.

The general law of public works for the island of Cuba provides as follows:

ART. 6. There are in charge of the municipalities:

First. The construction and preservation of local roads included in the plan of those which have to be taken care of with municipal funds.

Second. The works for supplying water to the towns.

Third. The drainage of lakes and unhealthy lands which are not included in the fifth paragraph of article 4 nor in the third paragraph of article 5, and which affect one or more towns.

Fourth. Ports of merely local interest.

Fifth. The construction and preservation of the buildings necessary for the service of the municipal administration.

Sixth. The works necessary to make and ornament the streets, squares, and boulevards of the towns.

ART. 10. The municipal administration shall, in accordance with the organic laws, have charge of—

First. The construction, repair, and preservation of local roads paid for by the municipal councils or which should be in charge of them, according to the provisions of this law.

Second. The water supply of towns, in so far as the construction of the works or the concession of the same to private enterprises is concerned.

Third. The drainage of lakes or unhealthy lands which are declared of purely local interest.

Fourth. The construction and preservation of ports of local interest.

Fifth. The construction and improvement of buildings devoted to public service which depend on the colonial department, and the preservation of historic and artistic monuments.

Sixth. Highways and ornamentation of towns.

The regulations for the execution of the general law of public works of the island of Cuba include the following:

ART. 91. Local roads, the supply of water, local ports, and the drainage of lakes and marshes of merely municipal interest are in charge of the municipal councils, in accordance with article 6 of the general law and the special laws of public works.

The plans of the works of the municipal councils shall be made in accordance with the provisions of the regulations for the execution of the special laws of public works.

The law of railroads for the island of Cuba provides as follows:

ART. 74. When the tramways are to be constructed on highroads which are exclusively in charge of one province, or traversing two or more municipalities, the concession belongs to the provincial deputation.

ART. 75. The concessions belong to the municipal council when the tramways occupy roads which are in charge of a single municipality. When they are essentially town roads, it must be preceded by the approval of the interior department.

The regulations for the execution of the railroad law for the island of Cuba include the following:

ART. 104. If the tramway is to occupy municipal highroads or streets within a single municipal district, in which case the municipal councils have the right to grant

concessions in accordance with article 74 of the law, the governor shall send the approved plan to the proper municipal council, which, after an appraisal of said plan, shall advertise the auction and grant the concession in accordance with the provisions of Chapter VII of the regulations of the 6th of July for the execution of the general law of public works.

ART. 105. If the tramway is to occupy roads or streets belonging to more than one municipality, but within one province, the plan must be separately submitted to each of the municipal districts it traverses, and in each of the towns the study of the plans on the ground and the investigations referred to in article 102 of these regulations shall be made.

The governor of the province, as soon as he has gathered the proceedings of the interested municipalities, shall proceed to the approval of the complete plan in the manner provided for by article 103.

ART. 108. Concessions of tramways made by municipalities by virtue of the law of railroads and of the corresponding articles of these regulations shall be subject, in so far as applicable and not in contradiction with what is herein provided, to the provisions of Chapter VII of the regulations for the execution of the general law of public works.

The Secretary will doubtless notice the absence from these citations of provisions relating to the use of streets and highways by "railroads of general service." This is to be accounted for by the fact that under the Spanish system such railroads were authorized only by special laws or charters enacted by the Cortes, wherein the rights and privileges of the chartered company were designated and conferred.

It was, however, necessary to secure the assent of the municipalities to the occupation by said railroads of highways or other property belonging to said municipalities. This assent antedated the passage of the law by the Cortes, and was to be secured as follows: When the promotion of a railroad in Cuba was contemplated, the promoters submitted a plan showing the location and plan of construction. If it appeared that said road would occupy highways, streets or other property owned or subject to regulation by a municipality or province, the plan was submitted to the municipal or provincial authorities charged with the administration of the affairs of the interested municipality or province. Examination and investigation followed, and if the municipality was satisfied it evidenced its approval by official action, and thereupon the assent of the municipality to the proposed occupation was deemed established. The plan so approved was returned, through official channels, to the authorities at Madrid, and by them considered and submitted to the Cortes, which thereupon became authorized to include the right so secured in the special law permitting the concession for the railroad.

(See Law of Railroads in force in Cuba; Law of Public Works in force in Cuba.)

The attention of the Secretary is directed to the fact that by Spanish law provision is made for the establishment of towns, or "pueblos," in territory included within the limits of a municipality. These towns

possessed certain rights in regard to town property and affairs which could be exercised independently. The municipal code in force in Cuba under Spanish sovereignty provides as follows:

ART. 86. Towns which, together with others, form a municipal district, and have their own land, water, pasture grounds, forests, or any other rights exclusively their own, shall preserve the private administration over the same.

ART. 87. For said administration they shall appoint a board, which shall be composed of one president and two or four members, all of whom shall be elected directly by the residents of the town, and from among them.

For towns of sixty or more residents there shall be four members, and two for towns having a smaller number.

When a town is laid out under the general law of Spanish dependencies the title to the town site is secured by the pueblo or town, the location is platted and the lots sold for the benefit of the town, the proceeds going into the town treasury. So much of the land as is dedicated to public use as streets becomes public property and subject to the provisions of the laws relating thereto.

The laws of Spain fully recognize the right of municipalities, cities, towns, and villages to acquire and dispose of real estate, subject to the royal regulations which were made from time to time for their government. When once acquired, neither the Crown nor its officers can take away or grant to others any of these municipal lands. (Novísima Recopilación, Lib. VII, Tit. 16, Law 1.)

The manner of granting lands to towns and municipalities and the manner in which they were allowed to rent or dispose of them were not uniform. They depended upon royal regulations, which were changed from time to time: At one period the towns and municipalities could grant or sell them and at another they could only lease them. These grants, sales, and leases were always made by the municipal or town authorities, with the permission of the Crown, but neither the monarch of Spain nor the Crown officers could themselves dispose of the lands once granted to, or acquired by, the municipalities or towns.

The next question considered is: Were the rights of property possessed by the municipalities of Cuba under Spanish sovereignty abrogated by the withdrawal of Spanish sovereignty from the island?

The treaty of peace (Paris, 1898) stipulated, in regard to property rights in Cuba, as follows (Art. VIII):

\* \* \* the relinquishment \* \* \* can not in any respect impair the \* \* \* rights which by law belong to the peaceful possession of property of all kinds of provinces, *municipalities*, public or private establishments, ecclesiastical or civic bodies, or any other association having legal capacity to acquire and possess property in the aforesaid territories.

In addition to stipulating that the "rights which belong to the peaceful possession of property" shall not be impaired, the treaty

prescribes a rule of conduct for the United States during the period of occupation. This rule is set forth in Article I as follows:

And as the island (Cuba) is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

The treaty of peace with Mexico (May 30, 1848) contained the same provisions in regard to the protection of property rights as are secured by Article VIII of the treaty of peace with Spain (December 10, 1898). (See U. S. Stats. at Large, vol. 9, p. 929, Art. VIII.)

Prior to the invasion of California the pueblo or village of San Francisco existed, and under the laws of Mexico was entitled to the territory, within certain prescribed limits, known as "pueblo lands." It had also an *ayuntamiento*, or town council, and an *alcalde*. The *alcalde* was the chief executive officer of the *pueblo*, and as such had authority to make grants of the *pueblo* lands. The exercise of this function was subject to the authority of the town council and to the higher authority of the departmental governor and assembly. The claim was made that *pueblo* lands which had not been granted to individuals prior to the conquest, became a part of the public domain of the United States, and, as such, subject to the exclusive control and disposition of Congress. The supreme court of California held, however, that such was not the effect of the conquest, but that the lands continued to be the public property of the municipality, as before the war, and that the laws of Mexico relating to the subject continued in force until changed by the legislative authority of the State. It was further held that an *alcalde* grant made after the conquest was presumed to be valid and was competent to convey title. (*Cohas v. Raisin*, 3 California, 443; *Hart v. Burnett*, 15 California, 530; *Payne & Dewey v. Treadwell*, 16 California, 221; *White v. Moses*, 21 California, 34.)

This doctrine is referred to and followed by the United States Supreme Court in *Merryman v. Bourne*, 9 Wall., 592. That case arose in California, and as the doctrine was a rule of property adopted by the supreme court of that State, it was binding upon the Federal courts. But the United States Supreme Court followed it without criticism and impliedly approved it. (See also *Moore v. Steinbach*, 127 U. S., 70, 81.)

It is well to call attention to the fact that the foregoing doctrine applies only to such property as belonged absolutely to the municipality before the change in sovereignty. A municipality would be powerless to alienate or affect the title to lands or other property which passes to the United States under the terms of the treaty of peace with Spain.

In *Moore v. Steinbach* (127 U. S., 70, 81) the Supreme Court of the United States say:

The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. The doctrine has no application to laws authorizing the alienation of any portions of the public domain or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject.

In *Moore v. Steinbach* the court held that the authority and jurisdiction of the Mexican officials in California terminated on July 7, 1846, and thereafter they "could do nothing that would in any degree affect the right of the United States to the public property." (127 U. S., 80.)

But the court further say:

The cases in the supreme court of California and in this court, which recognize as valid grants of lots in the pueblo or city of San Francisco, by alcaldes appointed or elected after the occupation of the country by the forces of the United States, do not militate against this view. Those officers were agents of the pueblo or city, and acted under its authority in the distribution of its municipal lands. They did not assume to alienate or affect the title to lands which was in the United States. (P. 81.)

In *Merryman v. Bourne*, 9 Wall., 592, 601, the court says:

The conquest of California by the arms of the United States is regarded as having become complete on the 7th of July, 1846. On that day the Government of the United States succeeded to the rights and authority of the Government of Mexico. The dominion of the latter sovereignty was then finally displaced and succeeded by that of the former. Before that time the pueblo or village of San Francisco existed, and under the laws of the country was entitled to the territory within certain prescribed limits known as pueblo lands. It had also an ayuntamiento or town council and an alcalde. The alcalde was the chief executive officer of the pueblo, and as such had authority to make grants of the pueblo lands.

The exercise of this function was subject to the authority lodged in the ayuntamiento, and to the still higher authority of the departmental governor and assembly. In the case of *Woodworth v. Fulton* it was held by the supreme court of the State that from the time of the conquest these pueblo lands, so far as they had not been granted to individuals, became a part of the public domain of the United States, and, as such, subject to the exclusive control and disposition of Congress. This doctrine was subsequently overruled in the case of *Cohas v. Raisin*. It was there held that the conquest had no such effect, but that the lands continued to be the public property of the municipality, as before the war; and that the laws of Mexico relating to the subject continued in force until changed by the legislative authority of the State. It was further held that an alcalde grant made after the conquest was to be presumed valid, and was competent to convey title. These doctrines are now firmly established as a part of the rules of property of the State.

In *Townsend v. Greeley* (5 Wall., 326) the court say (p. 334):

The treaty of Guadalupe Hidalgo does not purport to divest the pueblo existing at the site of the city of San Francisco of any rights of property or to alter the character of the interests it may have held in any lands under the former Government. It provides for the protection of the rights of the inhabitants of the ceded country to their property, and there is nothing in any of its clauses inducing the inference that any distinction was to be made with reference to the property claimed

by towns under the Mexican Government. The subsequent legislation of Congress does not favor any such supposition, for it has treated the claims of such towns as entitled to the same protection as the claims of individuals, and has authorized their presentation to the board of commissioners for confirmation. (See also *Grisar v. McDowell*, 6 Wall., 363.)

The case of *Palmer v. Low* (98 U. S., 1), involved conflicting claims of title to a piece of ground in San Francisco, Cal. The court sustained a title derived as follows:

On the 19th day of July, 1847, George Hyde was the duly qualified and acting alcalde of the pueblo of San Francisco, and as such alcalde, on the day last mentioned, granted the premises in controversy to George Donner, by a grant thereof duly made, recorded, and delivered by the alcalde. (P. 5.)

In *Cohas v. Raisin* (3 Cal., 443) the court held (see syllabus):

Before the military occupation of California by the Army of the United States, San Francisco was a Mexican pueblo or municipal corporation, and was invested with title to the lands within her boundaries.

The occupation and subsequent acquisition of California by the United States did not suspend or determine any rights or interest of San Francisco in such lands.

The pueblo retained during the war all its rights to municipal lands which had been conferred upon it previous to the war. The right to alienate is incident to that of ownership. The pueblo had the same right to dispose of its property during the war as a natural person.

In *Welch v. Sullivan* (8 Cal., 165) the court held that in California—

The pueblos, under the laws of Spain and Mexico, had the right to dispose of certain lands within their limits to defray municipal expenses.

The municipal law remained unchanged after the conquest until 1850, and grants of pueblo lands by American alcaldes were grants by the pueblo of its own property, which it had a right to confer.

In the body of the opinion the court say (197):

It is a misnomer to call these titles American alcalde grants. They were the grants of the pueblo of its own property, which it had the right to transfer by virtue of the municipal law which was continued in force by the new sovereign until 1850. (See also *Dewey v. Lambier*, 7 Cal., 347; *Hart v. Burnett*, 15 Cal., 530; *Payne and Dewey v. Treadwell*, 16 Cal., 232; *White v. Moses*, 21 Cal., 34.)

In the instance of Porto Rico the executive branch of this Government recognized that the transfer of sovereignty did not dispossess the municipalities of the island of the rights similar in character to those now under consideration. In order to prevent the improvident exercise of such rights, the President issued the following order (G. O. 188, A. G. O. 1898):

EXECUTIVE MANSION,  
Washington, December 22, 1898.

Until otherwise ordered, no grants or concessions of public or corporate rights or franchises for the construction of public or quasi-public works, such as railroads, tramways, telegraph and telephone lines, etc., shall be made by any municipal or other local governmental authority or body in Porto Rico except upon the approval of the major-general commanding the military forces of the United States in Porto Rico, who shall, before approving any such grant or concession, be so especially authorized by the Secretary of war.

WILLIAM MCKINLEY.

The attention of the Secretary is again directed to the provision of Article I of the treaty of peace with Spain (Paris, 1898), as follows:

And as the island (Cuba) is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property.

Since the United States voluntarily consented to be bound by them, it becomes necessary to ascertain what obligations relating to the protection of property and property rights are imposed by international law upon a military force maintaining military occupation of territory.

The governmental forces of the United States (military and civil) now in Cuba are engaged in maintaining an *occupation* of the island and not a *conquest*. *Occupation* is the temporary retention of territory, while *conquest* is the definite appropriation of it. Under the modern law of nations an occupying power is, as stated by Mr. Hall, "forbidden, as a general rule, to vary or to suspend laws affecting property or private personal relations." (Hall on International Law, 4th ed., chap. 4, par. 155.)

Halleck states the law as follows:

As military occupation produces no effect (except in special cases, and in the application of the severe right of war, by imposing military contributions and confiscations) upon private property, it follows, as a necessary consequence, that the ownership of such property may be changed during such occupation by one belligerent of the territory of the other precisely the same as though war did not exist. The right to alienate is incident to the right of ownership, and unless the ownership be restricted or qualified by the victor, the right of alienation continues the same during his military possession of the territory in which it is situate as it was prior to his taking the possession. A *municipality* or corporation has the same right as a natural person to dispose of its property during the war, and all such transfers are, *prima facie*, as valid as if made in time of peace. If forbidden by the conqueror, the prohibition is an exception to the general rule of public law and must be clearly established. (Halleck's Int. Law, 3d ed., chap. 33, par. 12, p. 448.)

The same author also says:

The conqueror who acquires a province or town from the enemy acquires thereby the same rights which were possessed by the state from which it is taken. If it formed a constituent part of the hostile state and was fully and completely under its dominion, it passes into the power of the conqueror upon the same footing. \* \* \* The case, however, is different where the enemy possessed only a quasi sovereignty or limited political rights over the conquered province or town. The conqueror acquires no other rights than such as belonged to the State against which he has taken up arms. "War," says Vattel, "authorizes him to possess himself of what belongs to his enemy. If he deprives that enemy of the sovereignty of a town or province, he acquires it, such as it is, with all its limitations and modifications. Accordingly, care is usually taken to stipulate \* \* \* that the towns and countries ceded shall retain all their liberties, privileges, and immunities." (Halleck's Int. Law, 3d ed., chap. 34, sec. 2.)

This brings us to the question: Is the legislation contained in the "Act making appropriation for the support of the Regular and Vol-



unteer Army for the fiscal year ending June 30, 1900," known as the "Foraker amendment," to be construed as a prohibition upon the exercise by a municipality in Cuba of the ordinary rights of ownership respecting property belonging to it? That is to say, Does the Foraker amendment constitute a "clearly established" "exception to the general rule of public law," whereby the exercise of private and personal rights of property is "forbidden by the conqueror?" The Foraker amendment reads as follows:

SEC. 2. That no property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States.

If this language is interpreted so as to prevent the municipalities of Cuba from determining how their property is to be used or in what manner the public right of user is to be enjoyed, it also prevents the municipalities from entering into agreements respecting the administration of other municipal affairs, such as cleaning and lighting the streets, employing municipal officers and agents, constructing public works, or making municipal improvements; for all such agreements create and grant certain rights which are property. Indeed, such interpretation would prevent a private individual, as well as a municipality, from executing a grant of conveyance of property, for if so interpreted, "property of any kind whatever" would include private property, and "any \* \* \* other authority whatever" would include the authority of individuals.

I believe this legislation constitutes a voluntary renouncement by the United States of the fruits of conquest in Cuba. It restricted the United States to the recent rule of modern times regarding military occupancy and precluded the exercise of the rights accorded by the ancient rule to a victor in war who had completed a conquest. By the Teller resolution the United States disclaimed an intention to assume permanent sovereign rights in Cuba, and by the Foraker amendment the United States surrendered the rights of a conqueror and voluntarily limited its authority to that of a temporary occupant under the modern laws of nations.

Historically we know that one purpose of the Foraker amendment was to preserve the species of property therein referred to until such time as the rights therein and thereto could be exercised by governmental agencies selected by the inhabitants of Cuba. That purpose is accomplished as to municipal rights and property in Cuba.

In considering what effect the Foraker amendment has on the exercise of the powers possessed by municipalities in Cuba, it must be borne in mind that, as ordinarily constituted, municipal corporations have a dual character, the one governmental, legislative, or public; the other proprietary or private. In the first or public capacity a responsibility exists in the performance of acts for the public benefit, and in this respect they are merely a part of the machinery of govern-

ment, an instrument of the sovereignty creating them, and the authority of the sovereignty over them remains supreme. In their proprietary or private character their powers are not conferred for purposes of state, but for the private advantage of the particular corporation as a distinct legal personality.

As was said by Folger, J., in 62 N. Y., 160:

There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power in the exercise of which the municipality acts as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is sovereign. The former power is private and is used for private purposes; the latter is public and is used for public purposes. The former is not held by the municipality as one of the political divisions of the State; the latter is.

The New York court also say (3 Hill, 531):

The distinction is quite clear and well settled and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company.

It is certainly proper to hold that the restrictions created by the Foraker amendment operate to prevent the grant of property, franchises, etc., created and conferred by an exercise of sovereign or political powers which the municipality is permitted to exercise for public purposes. It appears equally clear to the writer that said restrictions do not operate to prohibit grants made by an exercise of powers appurtenant to private and personal rights possessed by municipalities as legal personalities any more than said restrictions operate to prevent grants by individuals, firms, associations, and private corporations.

The right under consideration is a property right, personal to the municipalities and appurtenant to the proprietary title, and as such protected by the treaty of peace and the laws of war and nations.

To hold that said legislation prevents the municipalities of Cuba from exercising the common, ordinary rights of ownership, over property which belongs to them, is to convert a beneficent measure into an instrument of oppression.

If the foregoing compendium correctly sets forth the law and the facts, it follows:

1. The municipalities of Cuba now possess the same rights of property as they possessed under Spanish sovereignty.
2. Such property as a municipality could completely alienate under Spanish sovereignty is now subject to such disposition by the municipality.

3. Such property as a municipality under Spanish sovereignty could charge with an easement amounting to a servitude in favor of a private person or concern is now subject to a like action.

4. That, as now constituted and administered, the municipalities of Cuba are permitted to exercise the ordinary rights of ownership over property unto them belonging.

There remains to be considered the question of the procedure to be followed by the municipalities in exercising said rights.

The general provisions of the Spanish law regulating the conveyance of real estate in Cuba between private parties and concerns have been continued in force under the military government of the island. Apparently no reason exists why the provisions of the Spanish law regulating conveyances of real estate by municipalities in Cuba should not also be continued in force. The absence of objection to this course is the more apparent when it is considered that said provisions constitute a part of the law of municipalities in Cuba under which the continued existence of said municipalities and the administration of their affairs is maintained in the island.

Certain provisions of these laws or regulations have ceased to be of force and effect in Cuba, to wit, the requirements that the exercise of rights of ownership by municipalities must receive the approval of designated officials acting as the representatives in Cuba of the Crown of Spain. Under Spanish dominion a municipality might possess the ownership, but the right to encumber or convey, which is ordinarily an inherent attribute of ownership, was curtailed and made dependent upon the will of the Crown. The authority to exercise this royal discretion was conferred by the Crown upon certain Crown officials in Cuba. Upon the sovereignty of Spain being withdrawn from the island of Cuba, this authority ceased, and this particular limitation upon the right of the owner to encumber or convey departed with the deposed sovereignty. The limitation resulted from the continued authority of the Spanish Crown to impose it, and when that authority ceased, the limitation ceased. The authority in such matters theretofore exercised by the Spanish Crown officials was derived from the Crown, and exercised by them as a royal prerogative. Therefore said authority did not pass from said Spanish officials to the officers of the military government of civil affairs under the American occupation.

In his opinion as to the construction of sewers and pavements in Habana (Dady & Co.) delivered to the Secretary of War July 10, 1899, the Attorney-General says: (22 Op. 527, 528.)

By well-settled law, upon the cession of territory by one nation to another, either following a conquest or otherwise, \* \* \* those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. \* \* \* The authority of the power of the Crown and of

the Crown officers in such instances did not pass to the officers of the United States, because the royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of the treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereignty may provide.

In *Mumford v. Wardwell* (6 Wall., 435) the United States Supreme Court say:

Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. Municipal authority also was exercised for a time by subordinate officers appointed by our military commanders. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the department. By virtue of that supposed authority, Gen. S. N. Kearney, March 10, 1847, as military governor of the Territory, granted to the town of San Francisco all the right, title, and interest of the United States to the beach and water lots on the east front of the town included between certain described points, excepting such lots as might be selected for Government use.

\* \* \* \* \*

But the power to grant lands or confirm titles was never vested in our military governors, and it follows as a necessary consequence that the grant as originally made was void and of no effect. Nothing passed to the town by the grant, and, of course, the doings of the alcalde in selling the lot in question was a mere nullity.

In *Pollard's Lessee v. Hagan* (3 How., 225) the Supreme Court of the United States say:

It can not be admitted that the King of Spain could, by treaty or otherwise, impart to the United States *any* of his royal prerogatives, and much less can it be admitted that they have capacity to receive or power to exercise them.

While the authority of the officers of the Crown of Spain to direct and control the action of municipalities in Cuba in these matters has ceased, it does not follow that the local officials of said municipalities are without restraint in exercising the powers of their several offices. This restraint does not arise by virtue of provisions of the Spanish law, nor from the fact that Spanish officers were permitted by the reigning monarch to exercise his sovereign prerogative to impose it. The authority of the existing government of Cuba to impose restraints of this character is derived from the laws of war and nations applicable to the conditions existing in Cuba, and the exercise of the authority to impose restraints upon the power of local municipal officials in such matters is justified by the character of said military government, the relation it sustains to all of its inferior branches, the obligations to the inhabitants of the island assumed by the United States, and the necessity of imposing such restraints in order to accomplish the declared purposes for which the occupation was established.

The extent of the authority of the military government in Cuba over the affairs of municipalities in the island is set forth by Attorney-General Griggs, as follows (see letter to Secretary of War, July 10, 1899, 22 Op., 528):

Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal

government. In the exercise of these powers the proper authorities of the United States may change or modify either the form or the constituents of the municipal establishments; may, in place of the system and regulations that formerly prevailed, substitute new and different ones. Upon this line the same authorities exercising sovereignty over the island have the power to provide the methods, terms, and conditions under which municipal improvements which relate entirely to property belonging to the municipality or held by it for public use may be carried on. The old provisions of the Spanish law may be adopted, so far as applicable, or they may be entirely dispensed with, and a new system set up in their place.

Upon the question of procedure the conclusion reached by the writer is that the municipalities of Cuba may encumber or convey the land and other property owned by them by pursuing the procedure prescribed by the Spanish law relative thereto, saving and excepting the provisions requiring the assent and approval of the Crown of Spain or its officers, but subject to such restraints and requirements as may be imposed by the superior authorities of the military government of the island.

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The foregoing report was referred to the military governor of Cuba "for consideration" without action thereon by the Secretary of War.

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**REPORT ON THE DRAFT OF A PROPOSED ORDER OF THE MILITARY GOVERNMENT AUTHORIZING THE ORGANIZATION OF RAILROAD COMPANIES IN CUBA AND THE CONSTRUCTION, MAINTENANCE, AND OPERATION OF RAILROADS IN THAT ISLAND.**

[Submitted February 20, 1901. Case No. 2433, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your verbal instruction to examine and report on the proposed draft of an order of the military government of Cuba of the character indicated by above title. The draft of order which you handed me is herewith returned. I understood you wished the report thereon to review said order, not only as a proposed law for Cuba, but also as though it were a proposed law for one of the States of the Union.

The desired object of the investigation is to learn in what way and to what extent, if at all, said order would enlarge the powers of the public over private property and rights in matters relating to the construction, maintenance, and operation of railroads; what changes in procedure are contemplated, and to test the provisions of said order by comparison with the laws of the several States of the Union enacted for similar purposes. In pursuance of said general plan, I have the honor to report as follows:

I.

The proposed order does not provide a method for the organization of incorporation of railroad companies, nor require compliance with

the existing Spanish laws in regard thereto. I suggest that the order be amended so as to set forth complete authority and procedure for such incorporation, or that a general clause be inserted substantially as follows:

Railroad companies are hereby authorized to become incorporated in Cuba by following the procedure now established therefor by law, except as such procedure is modified by this order. Such incorporation and the shareholders therein shall be subject to the obligations and invested with the rights created or conferred by said laws and this order, and to the regulations and restrictions therein provided.

## II.

Section II of proposed order is as follows:

The capital stock of a company of this class shall not be less than \$6,000, United States money, for each kilometer of its main line.

The provisions of the Spanish law which this section would supplant are those of article 185, ninth section, commercial code, title "Railroad and other public work companies," as follows:

The capital stock of the company, together with the subsidy, should there be any, shall represent at least half the amount of the total estimate of the work.

The companies can not establish themselves before half of the capital stock has been subscribed to and 25 per cent thereof has been realized. (War Dept. Trans., p. 55.)

The probable purpose of said section II of the proposed order is to prevent weak or speculative companies from invading the field and subjective legitimate concerns to harassing competition for location and business. It naturally suggests the advisability of placing a limit at the other end of the stock issue as a possible means of preventing the stock from being watered. Another such means would be a requirement that the face value of stock should be paid in full upon being issued or the company authorized to begin business. Under Spanish dominion the danger of competition from speculative companies was slight because of the difficulty in securing a concession.

The distinguishing feature of the order, when compared with the Spanish law of railroads, is that it enables a railroad company to build a road and operate it without a "concession."

Under Spanish law it is not necessary to pay the full value of the stock before issued; and payment can be made in property duly appraised.

The attention of the Secretary is directed to the following provisions of the Spanish commercial code (War Dept. translation):

ART. 151. The articles of incorporation must include: The corporation capital, stating the value at which property, not cash, contributed has been appraised, or the basis on which the appraisal is to be made. \* \* \* The period or periods within which the portion of the capital not subscribed at the time of incorporation is to be contributed, otherwise stating the person or persons authorized to determine the time and manner in which the assessments are to be made.

ART. 164. In all certificates of shares, either payable to order or to bearer, there shall always be entered the sum which has been paid on account of its nominal value or that they are fully paid. \* \* \* All shares shall be payable to order until 50 per cent of their nominal value has been paid in. \* \* \* (See also articles 170 and 171.)

ART. 165. New series of stock can not be issued before the payment of the series previously issued has been made. Any agreement to the contrary included in the articles of copartnership or of corporation, in the by-laws or regulations, or any resolution adopted at a general meeting of members in opposition to this precept shall be null and of no value.

ART. 172. When the capital or the part thereof which a partner is to contribute consists of property the appraisalment thereof shall be made in the manner prescribed in the articles of association, and should there be no special agreement on the matter the appraisalment shall be made by experts selected by both parties and according to current prices, subsequent increases or reductions therein being for the account of the association.

In case of disagreement between the experts a third one shall be designated, selected by lot from among persons of his class who appear as paying the highest taxes in the locality, in order that he may adjust said disagreement.

Section IV of the proposed order provides as follows:

IV. When a railroad company has been duly recorded report thereof shall be made by the registrar to the secretary of public works, and the report shall be accompanied by a copy of the articles of incorporation signed by the president. Thereupon the company shall become invested with all the rights conferred by law on incorporated companies. \* \* \*

The order omits to subject the companies to the obligations imposed by law on incorporated companies.

Paragraph I, Section IV, is as follows:

1. To make freely, by its engineers, agents, or any employees, searches and examinations in public records of any kind for the purpose of collecting the information and documents which may be needed for its corporate purposes, and to enter on any lands and waters for the purpose of determining the line of the railroad, and to make plans and designs and to perform other works which may be proper for the accomplishment of its purpose.

The right to examine public records is so universally considered in the United States a public right possessed by all in common that its exercise passes without question. But in Cuba an obstacle is encountered; many records of a kind considered "public" in the United States, made under Spanish authority in the island, are, or at least were, private property. If the provision "To make freely" in the first line of the above-quoted paragraph is intended to enable the company to examine these records without paying the owner for the privilege, it amounts to a confiscation of what has been and still is considered, locally, private property. Doubtless many of these records, perhaps all of them, should belong to the public, and the private titles now asserted thereto, abrogated. Ample justification and authority probably exists for such action; but the experience of this department in depriving former Spanish officeholders of the right to administer

their offices admonishes us that such course would not be acquiesced in without protest.

If the object of said provision is to secure *access* to said records for the purpose of securing necessary information, that object may be attained without raising the question above suggested by amending the provision so as to read, "To make freely \* \* \* upon tender of the legal fees therefor." \* \* \*

The provision allowing the company "to enter on any lands and waters for the purpose of determining the line of the railroad, and to make plans and designs and to perform other works which may be proper for the accomplishment of its purpose," is understood to relate to preliminary surveys and examinations necessary to determine the definite location. In the United States this right is secured to railroad companies either by statute, by common consent, or by the authority given by statute to licensed surveyors.

Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line. \* \* \* (Ch. 16, sec. 81, Title, Railroads, Comp. Stats. of Nebr.)

In Cuba, under Spanish dominion, such authority must be secured by the action of various officials, boards, and tribunals, and the necessity of securing this special action constituted one of the many impediments to promoting public improvements by private enterprise.

The provision "and to perform other works which may be proper for the accomplishment of its purpose," if appearing in a statute of one of the States of the Union, would be liable to be construed as giving a broader authority than is required for preliminary purposes; in fact, as dispensing with the necessity for condemnation proceedings and relegating the proprietor to his remedy at law for a *quantum meruit*.

I think this provision should be omitted, and that the remaining provisions of the paragraph are sufficient for the legitimate purposes of the company.

Paragraph 3, Section IV, provides as follows:

3. To acquire by *expropriation* such real estate and *other property* as may be necessary for the construction, maintenance, and operation of its railway, but property so acquired shall not be used for any other purpose.

In the United States the authority of railroad companies to expropriate property is confined to real estate. The provisions of the paragraph quoted give authority to expropriate the horses and mules, building materials, etc., used in constructing the roads, and forever afterwards authorizes the supply department of the roads to expropriate coal, iron, oil, and anything else needed to maintain and operate the line. Abuse of said power would be inevitable.

Paragraph 6, Section IV, is as follows:

To construct, acquire, and operate telegraph and telephone lines along the lines of its railroad.



In the United States the railroad companies do not construct, acquire, and operate telephone lines, certainly not off of their right of way. It is not necessary to recite the arguments pro and con on the proposition involved. If the right is given them in Cuba, its exercise should be confined to the right of way of the road.

Paragraph 7, Section IV, is as follows:

To conduct water, and to build roads to and from the railroads.

I am unable to report that any of the general statutes of any of the States of the Union intended to authorize railroad companies to construct and operate railroads confer authority on said companies "to conduct water and to build roads to and from the railroads." There may be special statutes conferring such powers on individual companies, but such powers are not general. There may be reasons why these powers are essential to railroads in Cuba, but, if so, they are unknown to the writer. As set forth in said paragraph, the authority enables the company to construct waterworks and wagon roads, which being included in the law of railroads, would be considered as a part of said railway system, and enable the company to impose charges; that is, operate the waterworks for pay and charge tolls on the roads.

By thus including telephone lines, waterworks, and toll roads in the railroad system, and authorizing a railroad company to "expropriate real estate and other property," a railroad company in Cuba would be able to acquire the franchise and property of existing or future companies owning telephone lines, waterworks, or toll roads by condemnation proceedings. The existence of such authority would be a constant menace.

I suggest the amendment of Section IV so as to make a new paragraph of the concluding sentence of paragraph 9 and the insertion of the italicized words, making it read as follows:

10. In all cases *arising from the provisions of this section (IV)* the company shall indemnify the owners *or parties in interest* for (1) the value of the *property* acquired by expropriation and (2) for the damages that may be sustained.

The provisions of the proposed order regarding the expropriation of private property are not incompatible with the ideas and practices prevailing in a majority of the States of the Union, but said provisions constitute a departure from established principles of Spanish law.

The Spanish law of January 10, 1879, providing forcible expropriation for a work of public utility, contains the following:

ART. 3. The expropriation referred to in article 1 can not take place without the following requisites being first complied with:

First. A declaration of public utility.

Second. A declaration to the effect that all or a part of the real property which it is desired to expropriate is indispensably necessary for the execution thereof.

Third. An appraisal of what is to be sold or assigned.

Fourth. Payment of the price which represents the indemnity for what is forcibly alienated or ceded.

The declaring a work to be one of public utility was accomplished (in general) by the enactment of a law (art. 10, law of 1879). As to railroads in Cuba, such declaration was accomplished by the legislative act of the Cortes adopting a general system of railroads for the island and declaring the component parts thereof to be works of public utility (law of November 23, 1877). Such roads as were not included in said system were declared works of public utility by the law which authorized the concession under which they exercised the right of expropriation.

The proposed order dispenses with this declaration as a condition precedent to the exercise of the right of eminent domain and confers said right upon any duly incorporated and registered railroad company (par. 3, Sec. IV), limiting its exercise to the property necessary for the construction, maintenance, and operation of the road. (Sec. XXIII.)

The only restriction on the right of a registered company to build a road is that contained in Section XXI, which is as follows:

XXI. The secretary of public works may reject any plan which he may consider prejudicial to the public convenience or on the ground that the proposed line, when for public service, is not of public utility. Against such decision an appeal may be taken as provided in Article X.

Under Spanish law a railroad company was not permitted to decide for itself what and how much real property was necessary for its legitimate purposes and to expropriate such or as much real property as it desired. Hence the provisions of the second subdivision of said article 3, requiring as a condition precedent to expropriation—

a declaration to the effect that all or a part of the real property which it was desired to expropriate is indispensably necessary for the execution thereof. (Law of January 10, 1879.)

Authority for the determination of the questions involved and to make the declaration was conferred upon the administration by the following provision of law:

ART. 14. When a work has been declared of public utility, it is the duty of the administration to decide whether, for the execution of said work, all or part of the real property is necessary. (Law of January 10, 1879.)

In the United States, when authority to take property for public use has been duly conferred, it rests with the grantee to determine whether it shall be exercised, and when and to what extent it shall be exercised, provided, of course, that the power is not exceeded or abused. With us these questions are political in their nature and not judicial. The courts can not inquire into the motives which actuate the authorities or into the propriety of making the particular improvements. The same rule applies to individuals and corporations vested with the power of eminent domain and acting from considerations of private emolument. (*Dunham v. Hyde Park*, 75 Ill., 371; *Gates v.*

Boston, etc., R. R. Co., 53 Conn., 333; O'Hare v. Chi., etc., R. R. Co., 139 Ill., 151; St. Paul v. Nickl, 42 Minn., 262; In re Elevated R. R. Co., 113 N. Y., 275; Penn. R. R. Co. v. Diekman, 128 Pa. St., 509; Colorado R. R. Co. v. U. P. R. R. Co., 41 Fed. Rep., 293; Douglass v. Byrnes, 59 Fed. Rep., 29.)

The proposed order limits the amount of land which may be expropriated as follows:

XXII. The land required for a railway shall be considered to be a strip of 20 meters width, except in places where greater width shall be required for buildings, embankments, or cuttings; and such additional lands as may be required for burrow pits and quarries, for the diversion of streams and roads, the draining of marshy lands, for dikes and other works to protect the track from floods and freshets, as well as for yards, shops, wharves, platforms, storehouses, turnouts, switches, or for any other proper and useful purpose of a railway.

The proposed order provides that a railroad company may enter upon real property, dispossess the proprietor, and devote the property to the use of the road *prior* to the ascertainment of the amount of indemnity and the payment thereof. This is not permitted by the laws of Spain.

Railroad companies about to construct a line of road frequently desire to enter upon the construction without awaiting the final outcome of the condemnation proceedings. A means for so doing is commonly provided by the States of the Union. The proposed order makes provision therefor in sections 31, 32, 33. In the opinion of the writer, the authority granted by these sections is too broad. The sections are set out in full, and attention directed to the words in italics:

XXXI. At any time, *before* or after instituting proceedings for expropriation, or while an appeal is pending, the company may apply to the judge of first instance of the district in which the property sought to be acquired is situated, praying that possession thereof be given to it, which the judge shall *grant, as a matter of course*, if the case be one included in the provisions of this order, provided the company shall give *security*, to the satisfaction of the judge, to answer to the awards which the company may have to pay. *Possession so given shall be definite and irrevocable*, and the company may forthwith proceed with its works. *And in case the company shall not have given such security before instituting proceedings for the appointment of a commissioner, any party interested in the property sought to be acquired may petition that such security shall be deposited by the company.* In like manner possession shall be given to the company whenever it shall pay or deposit the amounts of the awards fixed, respectively, by the judge or by the audiencia.

XXXII. The judge shall refuse to appoint a commissioner or give possession of property in any case not included within and authorized by the provisions of this order. Against such refusal the company may appeal, in the form and manner provided in article XXIX. The company may petition, notwithstanding such refusal, *that provisional possession be given to it, and the judge shall grant such petition* upon the deposit by the company of such security as he may deem sufficient. Such possession shall be given forthwith, and the company may proceed with such works as it may deem proper in the premises, without prejudice to the final decision of the audiencia.

XXXIII. When an award has been made, though the party in whose favor it is made be not named, or when definite possession has been given, *before, during, or after* a proceeding for expropriation, *such possession shall not be annulled for any reason nor at any time.* The decree of definite possession shall be *sufficient title* for inscription of the property or interest acquired, in the name of the company, in the proper registry of property.

"The question arises: Is it advisable to confer upon railroad companies in Cuba the right to secure possession of private property and devote the same to the uses of the railroad prior to an assessment, award, and deposit of damages and judicial decree of expropriation, which said possession is to be irrevocable and sufficient in itself to constitute title?

In this connection the attention of the Secretary is directed to the following extracts from the several constitutions adopted by Spain during the past century:

Constitution of June 18, 1837:

ART. 10. The penalty of confiscation of property shall never be imposed and no Spaniard shall be deprived of his property except for a duly proved cause of public benefit, *after the proper indemnity.*

Constitution of May 23, 1845:

ART. 10. The penalty of confiscation of property shall never be imposed and no Spaniard shall be deprived of his property except for a proved cause of public benefit, *after the proper indemnity.*

Constitution of June 1, 1869:

ART. 13. No one can be deprived, either *temporarily* or permanently, of his property and rights, *nor be disturbed in the possession thereof*, except by virtue of a judicial decree.

Public officials who, under any pretext whatsoever, should violate this provision, shall be personally liable for the injury caused.

Cases of fire or flood or other similar urgent cases are excepted in which by the occupation a danger to the owner or possessor may be avoided, or the evil which may be feared or which may have occurred may be avoided or lessened.

Constitution of June 30, 1876:

ART. 10. The penalty of confiscation of property shall never be imposed, and no one shall be deprived of his property except by a competent authority and for a proved cause of public benefit, *always after the proper indemnity.*

*Should this requisite not have been complied with, the judges shall protect, and, in a proper case, shall restore possession to the person dispossessed.*

The exercise of this authority so recognized in these constitutions was regulated by law. The law of July 17, 1836, provided as follows:

ART. 1. The right of ownership being inviolate, no private individual, corporation, or establishment of any kind whatsoever can be forced to cede or assign what may belong to it for works of public interest without the following requisites first being complied with: First. A formal declaration that the work planned is of public benefit and the proper permission to carry it out. Second. A declaration that it is indispensable that all or a part of an estate be ceded or alienated for the execution of the work of public utility. Third. An appraisal of what is to be ceded or alienated. Fourth. The payment of the price of the indemnity.

\* \* \* \* \*

ART. 8. The entire appraised value shall be paid the person interested before his dispossession, or shall be deposited if there should be a claim of a third person by reason of an emphyteusis, easement, mortgage, lease, or any other charge on the property, the declaration of the respective rights being left to the ordinary courts. In addition, the person interested shall be paid 3 per cent of the entire appraised price.

This law was superseded by the law of January 10, 1879, wherein it was provided:

ART. 3. The condemnation referred to in article 1 can not take place until the requisites following have been complied with:

\* \* \* \* \*

Fourth. The payment of the price which represents the indemnity for what is forcibly alienated or ceded.

ART. 4. Any person deprived of his property without the requisites mentioned in the foregoing article being complied with may institute summary proceedings to retain or recover possession in order that the judge may protect, and, in a proper case, restore possession to the person improperly expropriated.

The civil code in force in Cuba under Spanish sovereignty provided as follows:

ART. 349. No one shall be deprived of his property except by competent authority and with sufficient cause of public utility, *always after* proper indemnity. If this requisite has not been fulfilled, the judges shall protect, and, in a proper case, replace the condemned party in possession.

I find, however, that the law of January 10, 1879, contains the following:

ART. 29. The administration, or its legal representative, may, if advisable, occupy at any time real property that may have been the subject of an appraisal, on the deposit of an amount equal to that fixed in the statement of the expert of the owner, for which purpose the governor of the province shall issue the proper orders.

The owner has the right to receive 4 per cent per annum on the amount stated for the period of time that elapses until he receives the amount of the expropriation definitely determined.

The proposed order increases the authority of the companies and enables a railroad company to dispossess the owner prior to the deposit of the amount of the ascertained indemnity.

The rule on this subject is not uniform in the United States. The constitutions of many of the States provide either that compensation shall be first made in all cases or that it shall be first made when the taking is by individuals or corporations or for specified purposes. In some instances the constitutions provide that compensation shall be first made or deposited, or secured in such manner as shall be provided by law. In all of the States the constitution, as now interpreted, requires that compensation must be made, and in most of them is silent as to when compensation shall be made.

The decisions of the courts are no more uniform than the provisions of the constitutions of the several States. At first it was held that the taking contemplated by the constitution was not accomplished until

the title passed, and therefore occupancy did not create the right to compensation. Subsequently this theory was abandoned, and the doctrine established that when a person is ousted from possession under a claim of right his property is taken from him.

In most of our States it is held that the making of compensation need not precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation without resorting to the ordinary means of collection.

The Supreme Court of the United States hold such course to comply with the requirement of the Federal Constitution. In *Cherokee Nation v. Kansas Railway Company* (135 U. S., 659), the court say:

The Constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled is sometimes a question of difficulty.

In those States where the constitution contains no specific provision as to the time or manner of compensation, the cases may be divided into two principal classes: First, those holding that the compensation must be paid before entry; second, those which hold that it may be ascertained and paid after entry. The cases in the second class are to be again divided into two subordinate classes; first, those which hold that no security is necessary; second, those that hold some security is necessary. The first of these is to be again divided into those which make a distinction in respect of public corporations and those which do not. The great diversity and confusion in the decisions show the lack of any guide when it is once held that compensation need not first be made.

The proposed order provides a summary means of securing an appraisal and award, and limits to a few days the time in which the courts must act thereon. It appears to the writer that this is sufficient for the actual necessities of the railroad companies. Extraordinary occasions may arise where that procedure is inadequate to prevent annoying delay; but it is dangerous for the lawmaking power to provide for exceptional cases by a grant of power which may be abused in ordinary cases; or to violate a fundamental principle in order to preclude the possibility of individual annoyance arising from delay in court proceedings.

The proposed order provides that the railroad company may expropriate streets, parks, and other property belonging to cities, towns, and other municipal subdivisions of the island by the proceeding followed in expropriating private property. (Sec. XXVII.)

Attention is directed to the fact that the general grant of power set

forth in said proposed order does not authorize railroad companies to occupy streets, parks, etc., belonging to municipalities, nor does it authorize the municipal authorities to deal with the companies in regard thereto. Such authority as the company or municipal authorities would have must be derived by inference from the provision made for fixing the amount of damages. In the absence of a specific grant a question might arise as to the authority to occupy or to divest title of property belonging to a municipality, even when a procedure is provided. (Penn. R. R. Co. v. Phil. Belt, etc., Co., 10 Pa. Co. Ct., 625.)

In the United States, before a railroad can lawfully occupy a street, it must have authority to do so from the legislature or from a municipality having power to grant it. A railroad can not occupy a street under its general authority to make a location; such right must be expressly granted or necessarily implied. Municipalities can not grant the use of streets for railroad purposes without legislative authority, and the prevailing doctrine is that such authority is not derived from the general power to control and regulate the streets. (55 Ala., 413; 9 Bush (Ky.), 127; 80 Ga., 793; 56 N. J. Eq., 259.)

The proposed order also provides that railroad companies may institute condemnation proceedings against the public property, title to which is now held by the United States in trust for the people of Cuba.

I understand the position taken by the War Department on the questions involved to be as follows:

1. The President, as a civil officer, can not dispose of or pass title to property the proprietary title to which is held by the United States, either for the people of this Union or in trust for another, unless he is authorized so to do by act of Congress.
2. The President, as Commander in Chief of the Army and Navy of the United States, and therefore the head of the military government of civil affairs in Cuba, may dispose of and pass title to public property in Cuba if he considers such action necessary for the accomplishment of the purposes set forth in the instructions given him by Congress in the joint resolution of Congress adopted April 20, 1898 (30 U. S. Stats., p. 738), being authorized to exercise the powers of a belligerent commander until said orders, to accomplish which the war powers of the nation were called into action, have been carried out.
3. That said authority to dispose of public property or pass title thereto will not be exercised as to public property in Cuba.
4. That when the welfare of the inhabitants of Cuba, or the exigencies of the public service require the use and occupation of public property by private concerns or quasi-public improvements, such use and occupation may be authorized by revocable license, terminable at the discretion of the public authorities.
5. The authority of the Secretary of War to grant revocable licenses

is derived from the laws of war and the acts of Congress. (See Supp. to U. S. Rev. Stats., vol. 2, chap. 316, p. 56; Act App. July 28, 1892, 27 U. S. Stats. at L., p. 321, chap. 316.) The authority thus given the Secretary of War may be exercised as to property of the United States wherever situate, without regard to the territorial boundaries of the United States.

Under the established practice of the War Department, a railroad company in Cuba desiring to occupy roads, beds of rivers, land, or other property which at the time Spanish sovereignty was withdrawn from Cuba belonged to the Spanish Crown, can secure only such temporary right so to do as is derived from a revocable license.

The proposed order prescribed the rule for fixing the amount of indemnity for the expropriation as follows:

XXVIII. The commissioner, in reporting on compensation due for values taken or damages sustained, shall take into consideration the increase of value acquired by lands through which the railroad is to be built and shall deduct the same in estimating the loss or damage caused by the company's taking possession thereof or of any right, interest, or use therein by expropriation.

This rule is the same as the rule prescribed by the Spanish law of January 10, 1879, as follows:

ART. 28. In the same (the appraisements) the bases for the appraisalment must be stated in detail, whether relating to the character of the property or to the price affixed thereto. The experts shall take into consideration all the circumstances which may tend to increase or diminish their value with regard to other similar property which may have been the subject of recent appraisals situated in the same municipal district, and to the value of the part of the property occupied shall be added the amounts representing the losses and damages which may be caused them by the work on account of which the condemnation was effected; in compensation of said losses and damages or part thereof the benefit derived by the remainder of the property must also be taken into consideration.

In the States of the Union the rule appears to be that, in the absence of a constitutional provision prohibiting it, the legislature may provide that benefits may be set off against damages, although this is denied by the Mississippi court. (34 Miss., 227, 241.)

The State constitutions adopted in recent years usually prohibit such set-off, and the present tendency in the United States is in that direction. The attention of the Secretary is directed to the fact that such set-off by a railroad company is prohibited by the constitution in Alabama, Arkansas, California, Iowa, Kansas, North Dakota, Ohio, South Carolina, and Washington.

The exclusion of benefits is required by statute in Indiana and Illinois, and by judicial decision in Mississippi.

In the United States where benefits may be set off there is a diversity of decision, which may be classified as follows:

1. *Special* benefits only may be set off against damages to the *remainder*, but not against the *part taken*. Rule in Maryland, Nebraska, Tennessee, Virginia, West Virginia, and Wisconsin.



2. *General* as well as special benefits may be set off against damages to the remainder, but not against the value of the part taken. Rule in Georgia, Kentucky, Louisiana, and Texas.

3. *Special* benefits only may be set off against both damages to remainder and value of part taken. Rule in Connecticut, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, and Vermont.

4. General as well as special benefits may be set off against both damages to remainder and value of part taken. Rule in Delaware and New York.

In many States a distinction is made between a taking by municipal corporations for streets, roads, etc., for the free use of the general public, and a taking by a railroad company for the financial benefit of the promoters.

The objections to allowing such set-off are as follows:

1. Enforced compensation for deprivation of property and rights to which the possessor does not consent can be made only with money; it can not be made with other land or increase of value to land.

To illustrate: Natural justice revolts at the idea that a man who with time and money has secured a fine park, hoping to enjoy it in privacy and quiet, should have his efforts brought to naught by a railroad running through it, and, when he seeks compensation, to be told that nothing is due him, for the advent of the road affords him an opportunity of running a beer garden.

2. These benefits are always prospective and therefore problematical and speculative, while the taking and damage is definite and certain. It would therefore be a payment for present loss by a prospect of future advantages which might never be realized.

3. An individual whose property is increased in value by a public improvement compensates the public therefor by the increase in his taxes.

4. To offset *general* benefits against the claims of the property owner is to require him to pay for what the general public secures for nothing.

The provisions of the proposed order regarding condemnation proceedings skillfully adapt the instrumentalities of Spanish court procedure to the methods prevailing in the United States. Under Spanish law no person could be divested of title to property by having the title transferred to another, "except by virtue of a *judicial decree*." (Art. 13, Const. of 1869.)

The Spanish constitution of 1876 provided that "no one shall be *deprived of his property* except by a competent authority," but my investigation leads me to believe that where the deprivation extended to a divestment of title in one and the transfer thereof to another there continued the necessity for a judicial decree.

Attention is directed to the fact that under the proposed order the value of the property taken or injured is fixed by one man, appointed a commissioner for that purpose. In the United States it is usual to have the appraisal made by more than one.

The proposed order provides that such commissioner is to be appointed by the judge of the court of first instance, and any party in interest may appeal to the audiencia, which tribunal may annul the appointment; pending action by the audiencia the commissioner continues to act, and his action is binding. If the audiencia annul the appointment, the judge of first instance appoints another commissioner, from which action an appeal can not be taken. (Sections XXIV and XXV.)

The commissioner, being appointed, shall call together the parties claiming an interest in the property desired. At the time and place of meeting he first passes upon the title of the claimants, and only those found to possess a title or interest of value are admitted to the meeting. The question of title being disposed of, the matter of value is investigated and testimony is taken and reduced to writing. Thereafter the commissioner makes his award and reports the entire proceeding to the judge of the court of first instance, who is required to approve or disapprove the findings within five days. Thereafter and within five days "any party interested" may appeal the proceeding to the audiencia of the province. (Sec. XXVI et seq.)

I doubt the advisability of holding a mass meeting of the property owners and attempting to deal with them in bulk. My experience in matters relating to railroad rights of way among the "sober Saxons" of this country induces a belief that such a meeting is better calculated to effect a fracture of the peace than a dispassionate judicial determination. The property owners should certainly be given a hearing, but I think it would be better to hear them separately.

The proposed order provides that at the time and place for the meeting of the persons asserting a right to indemnity the commissioner who is to take the testimony on which the award is based shall first enter upon an investigation of the titles asserted by the claimants. In that regard the provisions of said order are as follows:

All such persons shall, before being admitted to the meeting, disclose the nature of their interests, and the commissioner shall summarily and without appeal pass upon their qualifications. (Sec. XXVI.)

This summary and final disposal of the question of title does not seem in keeping with the established ideas of justice or the stipulations of the treaty of Paris relating to personal and property rights in Cuba. Adequate provision should be made for appeal where the rights asserted are abridged or denied.

My understanding is that titles in Cuba are complicated and that it is difficult to establish them by what is ordinarily considered compe-

tent proof. I further understand that this difficulty is increased in certain parts of the island by the loss of the Spanish records. Attention is also directed to the fact that the proposed order does not require that the commissioner shall be an expert in the matters over which he exercises authority or be conversant with the law of real property. Under these conditions it seems advisable to prescribe some rule of evidence for establishing a title, or at least *prima facie* title, in condemnation proceedings, and also to require the appointment of experts as commissioners.

Under the Spanish law the appraisal was conducted substantially as follows: The company appointed an expert who fixed the value, and the company tendered the amount to such person as it considered to be the proper party. If the owner was dissatisfied he appointed an expert who assessed the value, and the owner transmitted his report to the company and made demand for the amount so ascertained. If an agreement could not be reached by the owner and the company, the experts appointed by each were to meet and, if possible, agree. Failing in this, the governor of the province requested the judge of the district to appoint a third expert, who fixed an amount and reported thereon to the governor, who decided the amount to be paid, from which decision an appeal lies to the Crown. (Sec. III, Title II, Law of Jan. 10, 1879.)

The rule of evidence for establishing title in condemnation proceedings under Spanish law is as set forth in the following articles of the law of 1879:

ART. 5. The appropriation proceedings shall be conducted with the persons who, in accordance with the registry of property or the tax list, appear as the owners or as having their possessions recorded.

If on account of their age or for any other reason the owner of a piece of property should be incapacitated to enter into a contract and should have no curator or other person to represent him, or the property should be the subject of litigation, the proceedings shall be conducted by the *promotor fiscal*, who may validly perform in his name all that is stated in the foregoing article.

When the owner of an estate is unknown, or, if known, his whereabouts are unknown, the order or decree relating to expropriation of the estate shall be published in the *Boletín oficial* of the province and in a *Gaceta de Madrid*. Should no statement be forthcoming within a period of fifty days, either from the owner in person or through some one duly empowered, it shall be presumed that consent is given for the representative of the department of public prosecution to represent said owner in the appropriation proceedings.

ART. 6. All those who can not alienate the property which they administer without the permission of a judicial authority are authorized to do so in the cases mentioned in this law without prejudice to securing in accordance with law the amounts which they may receive in consequence of the alienation in favor of the minors or wards. In no case shall said amounts be delivered to them, but they shall always be deposited and held at the disposal of the proper judicial authority.

ART. 7. Transfers of ownership, under whatsoever title, shall not prevent the continuation of the expropriation, the new owner being considered as substituted in the obligations and rights of the former owner.

ART. 8. The rents and contributions pertaining to the property to be expropriated for works of public utility shall be admitted during the year following the date of the alienation as an evidence of the legal capacity of the person condemned to exercise the rights which may pertain to him.

The general features of these provisions of the Spanish law should be incorporated in the proposed order. If a satisfactory rule can not be provided, provision should be made for appealing disputed questions of title to the courts.

In addition, I suggest that said commission—

1. Be increased numerically.
2. Be required to take an oath and act thereunder.
3. Be required to personally inspect the premises to be affected by its action.
4. That the railroad company be required to furnish the commission a general plan of the line with longitudinal profile and cross-section drawings of the proposed construction of the road on the premises sought to be condemned.

These drawings are necessary to advise the commission as to the contemplated construction and enable it to determine the character and extent of damage to the property not taken.

Section X of the proposed order is as follows:

SEC. X. Maximum tariffs for the transportation of passengers, baggage, and freight shall be submitted in advance to the secretary of public works for his approval; and he may afterwards reduce such rates once in every period of five years. Against such decisions and reductions by the said secretary any railroad company may appeal at any time to the supreme court of Cuba which, sitting as a court of administration, shall decide the question summarily, after calling for such reports as it may deem necessary.

It is unnecessary to discuss herein the question of regulation of railroad rates by the government. It is sufficient to direct attention to the fact that upon the maximum rates being once established the authority of the government to reduce them can not be exercised for five years. The justification or necessity for reduction of railroad rates depends upon conditions which change continually and not at stated intervals. The commerce of Cuba is unsettled and undeveloped. Classification of freight at this time would be largely guesswork. If the government is to exercise this power, it should be free to exercise it as necessity requires and prudence dictates. If the government is to regulate the tariffs, it should also regulate the classifications, otherwise the authority to regulate is a "barren scepter."

The provision of said section regarding appeal to the supreme court should be modified by inserting the words "and evidence" after the word "reports."

For your further information I transmit herewith a translation of the Spanish "law of January 10, 1879, relating to forcible alienation for a cause of public utility." This law had not been translated when

your request for this report was received, and the necessity of awaiting its translation has occasioned a slight delay in complying with your request.

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The necessity for increased transportation facilities in Cuba, and the continued demand of the inhabitants therefor, induced the military government to attempt to provide for the construction of railroads in the island. A general order was drafted and submitted to the Secretary of War. The foregoing report was made on said order; the report was communicated to the military governor, and the proposed order modified so as to meet the objections and suggestions set forth in said report. (See Order No. 34, Headquarters Department of Cuba, dated February 2, 1902.)

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**IN THE MATTER OF AN INQUIRY FROM THE STATE DEPARTMENT REGARDING THE CLAIM OF MERRYWEATHER & SONS, LONDON, ENGLAND, FOR DAMAGES OCCASIONED BY THE REFUSAL OF THE CITY OF MANILA TO PERMIT THE FURTHER EXECUTION OF AN ALLEGED CONTRACT FOR SUPPLYING CERTAIN FIRE APPARATUS.**

[Submitted December 6, 1900. Case No. 999, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your request for a report on the above-entitled matter, and in response thereto I have the further honor to report as follows:

The matter reaches the War Department by reference from the State Department of certain notes from the British ambassador at this capital calling attention to the claim for damages made by Messrs. Merryweather & Sons, of London, England, a British trading concern.

The statement of facts made by Merryweather & Sons is controverted by the municipal authorities of Manila. Messrs. Merryweather & Sons assert that, prior to the late Spanish-American war, the municipality of Manila entered into a contract with them for the purchase and sale of certain fire apparatus for the use and benefit of the city. The present municipal authorities of Manila deny that such contract was ever entered into by the city and insist that the contract, if it ever existed, was between Messrs. Merryweather & Sons and Messrs. Aldecoa & Co., a mercantile concern doing business in Manila. (See doc. 17.)

The present municipal authorities of Manila assert that two members of the firm of Aldecoa & Co. were also members of the Manila city council, and that said firm contracted with Merryweather & Sons for

said fire apparatus, expecting to thereafter dispose of the same by a sale to the city. (See doc. 17.)

The present municipal authorities of Manila refuse to accept and pay for said apparatus, and assert that it is not needed by the city nor adapted to its use. (See doc. 19.)

The documents now before this Department do not set forth any proof of the existence of said contract nor make any showing in regard thereto further than the statements of complainants contained in their letters.

If it were conceded that said contract was entered into by the city, it does not follow that the city was not at liberty to refuse compliance therewith by submitting to the resulting liability for damages. In the opinion of the Attorney-General as to construction of sewers and pavements in Habana (Dady & Co.), delivered to the Secretary of War July 10, 1899, it is stated:

No one has a right to insist upon the specific performance of a contract for the improvement of streets in a municipality. A city may suspend or entirely abandon a project, although covered by a valid contract, subject only to the right of the contractor, if damaged, to recover just compensation. (22 Op. 529-530.)

The complainants recognize this right and therefore do not contend for an opportunity to complete a sale and to require payment of the purchase price. They demand damages for the abandonment. Complainants state that the purchase price was £3,886, and the damages are placed at £1,300. The measure of damages adopted by them is probably the difference between the contract price and the market value of the apparatus. No showing has been made to this Department as to whether or not this difference amounts to £1,300.

The attention of the Secretary is directed to the fact that, primarily if not exclusively, this controversy lies between the complainants and the city of Manila. The questions involved are of a kind and character which are ordinarily resolved by the courts. There does not seem to be any reason why this controversy should not be relegated to the courts and complainants required to pursue the ordinary remedies afforded thereby. Apparently there exist no reasons for the Secretary of War to exercise his authority in a controversy between an individual and a municipality in the Philippines over a disputed contract than would apply in the case of a similar dispute between individuals.

From the correspondence submitted by the State Department it appears that Messrs. Merryweather & Sons entertain the belief that the Federal Government of the United States is liable for the damages alleged to have been sustained by them. (See doc. 18.)

In arriving at this conclusion, the complainants have ignored the fact that the acts of which they complain were performed by the officials of the city of Manila. When that city became subject to military occupation the incumbents of political offices for the administration

of existing laws ceased to possess authority to continue such administration. Their several terms of office lapsed, and the authority to administer such powers as the municipality retained, passed to such persons as were designated for that purpose by the commander of the occupying military forces. It was the same as though a new corps of municipal officials had been elected and installed in office.

The powers exercised in refusing to recognize said alleged contract were powers possessed by the municipal corporation, and exercised by municipal officials for the benefit of the municipality. If a legal liability for damages resulted therefrom it attached to the city, and was not imposed upon the Federal Government of the United States. If this conclusion is erroneous and a liability did attach to the Federal Government of the United States a claim therefor is one of unliquidated damages. The War Department is not authorized to settle and adjust claims for unliquidated damages. Such claims must be submitted to Congress. If the complainants insist that the Federal Government of the United States is liable for said unliquidated damages they should induce their Government to present their claim to the State Department through diplomatic channels, and thus comply with the rule adopted by Congress that alien claims must be approved by the State Department before Congress will consider them.

Apparently the complainants are of opinion also that the military government of the Philippines, as distinguished from the municipality of Manila, is liable for the payment of the alleged damages. That is, the claim should be paid out of the insular treasury, instead of the municipal treasury.

Undoubtedly the Secretary of War, as the head of the military government in the Philippines, has such authority over the funds of said government that he may direct the application of said funds to the payment of this claim if his discretion prompts him so to do; but in order to secure such action it is necessary that he should be informed as to the facts involved. In the instance under consideration the vital facts are disputed, and the local authorities deny the existence of the contract on which the claim is based, and no evidence is submitted to establish the amount of damage under any rule of measurement.

If the Secretary is of opinion that probable cause exists for a belief that the military government of the Philippines is liable in this matter, it would seem advisable to refer the case to the military governor with instructions to appoint a commission to investigate the matter and report thereon, through the proper channels, to this Department. Ordinarily it would hardly seem advisable to admit as possible that the municipal authorities at Manila could impose a liability upon the treasury of the insular government. But this instance involves certain unusual proceedings not hereinbefore set out, which may induce the Secretary to believe that the military government of the islands is

equitably if not legally bound to respond in proper damages if the alleged contract was entered into by the city. They are as follows: On June 3, 1898, Messrs. Merryweather & Sons addressed the following communication to the Hon. John Hay, at that time ambassador of the United States at London (see doc. 10):

LONDON, 3d June, 1898.

The Hon. JOHN HAY,

*5 Carlton House Terrace, S. W.*

YOUR EXCELLENCY: In the month of February last we received an order from the chief of the fire brigade at Manila, Philippine Islands, for some steam fire engines and fire-brigade apparatus, to the value of a considerable sum. This apparatus was in the course of construction on the outbreak of the war, but none of it was finished in time to be dispatched before hostilities commenced. All arrangements, however, were made for payment, on dispatch, through a firm of bankers in London, and the whole of the apparatus was put in hand by us.

We have lately noticed in some of the papers published in the United States paragraphs to the effect that Mr. Williams, the consul for the United States at Manila, intends to use his best efforts to induce the city to equip its fire department wholly from the United States, and it seems to us that when Manila is occupied by the United States forces, influence may be brought to bear to induce the Spanish officials in Manila to endeavor to countermand the order in question.

As the withdrawal of the order, now that the apparatus is practically completed, would involve a serious loss to us and as we can not believe that the Government of the United States would desire that the operations in Manila should interfere with private business, especially with an English house, we venture to ask whether it is possible for you to represent to the authorities at home the desirableness of requesting their officers in the Philippines not to take any steps to induce the officials in command of the fire brigade at Manila to alter the arrangements already made with us for the supply of the material required.

We are quite sure that having regard to the universal desire in this country for the success of the American arms in the present war your Government does not wish that success to result in the transference from English houses of business already in course of transaction with any of the Spanish colonies.

Soliciting your kind offices in the matter, which will be greatly appreciated,

We have the honor to remain, sir, your obedient servant,

MERRYWEATHER & SONS, Lt.

The American ambassador forwarded said communication to the State Department, and the Secretary of State on June 21, 1898, referred it to the War Department with the following comment:

I have the honor to submit the letter of Messrs. Merryweather & Sons for your consideration, to the end that such instructions on the subject as may be deemed proper may be sent to General Merritt. (See doc. 9.)

At this time (June, 1898) the Insular Division of the War Department was not in existence. The letter was sent to the office of the Adjutant-General. The United States was then engaged in actual hostilities in conducting the war with Spain. Since the matter related, in a measure, to the conduct of the troops in the field, the letter was advanced to the office of the Major-General Commanding, where it received the following indorsement:

The Major-General Commanding recommends favorable consideration of the request of Messrs. Merryweather & Sons. (2d Ind. doc. 9.)



Thereafter the document was advanced to the office of the Secretary of War, where it was indorsed on July 11, 1898, as follows:

Approved and respectfully returned to the Adjutant-General to transmit a copy of these papers to Major-General Merritt, commanding the Eighth Army Corps, for his information and guidance. (4th Ind. doc. 9.)

A copy of the papers and indorsements was sent to Major-General Merritt. (5th Ind. doc. 9.)

Thereafter and on July 25, 1898, the following communication was sent from the American embassy in London (see doc. 7):

SIRS: With reference to your letter of the 3d ultimo to the ambassador requesting that your contract with the authorities of the fire department at Manila be not interfered with by the American officials when they occupy that city, I am directed by His Excellency to acquaint you that he has received a communication from the Secretary of State informing him that your request has been favorably considered by the Secretary of War, and that the papers in the case will be transferred to Major-General Merritt commanding the Department of the Pacific for his information and guidance.

HENRY WHITE.

MESSRS. MERRYWEATHER & Co., *Greenwich Road, London.*

The complainants herein are certainly not amenable to a charge of lack of diligence in asserting or vigilance in protecting their claims, since they appear at the American embassy in London on June 3, 1898, at which time the smoke of the burning Spanish vessels in Manila Bay had hardly disappeared.

The complainants now insist that they were induced to proceed with the construction of said fire apparatus by said correspondence with the American ambassador. Therefore the attention of the Secretary is especially directed thereto.

The attention of the Secretary is further directed to the fact that few cities are completely and adequately supplied with fire apparatus. If the apparatus involved herein is suitable and the city has a present or prospective need therefor, a speedy and happy solution of the present difficulty would be to accept the apparatus and pay a reasonable price therefor. Opposed to this, however, is the fact that the municipal officials under the American administration, "upon investigation, reached the conclusion that the engines and apparatus ordered from this London firm were in no sense adapted to the needs of the city of Manila." (See Doc. 19.)

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Pursuant to the views expressed in the foregoing report, the Secretary of War responded to the inquiry from the State Department as follows:

DECEMBER 6, 1900.

SIR: I have the honor to further acknowledge the receipt of your letters transmitting copies of the several communications received by the State Department from the British embassy in this capital, relative to the claim for damages alleged to have

been occasioned Messrs. Merryweather & Sons, London, England, by reason of the refusal of the present municipal authorities of Manila to carry out the provisions of an alleged contract for supplying certain fire apparatus to said city, and requesting the views of this Department. In reply thereto I have the honor to state as follows:

From the correspondence submitted it is difficult to determine whether Messrs. Merryweather & Sons elect to urge said claim against the municipality of Manila, the military government of the Philippines, or the Federal Government of the United States. If presented to either of said governments the claim must rely on an alleged contract with the city of Manila, the creation and existence of which is denied by the present municipal authorities of Manila, who assert that said contract was not entered into by the city, but if a contract existed it was between Messrs. Merryweather & Sons and Messrs. Aldecoa & Co., a local Manila firm.

As at present advised, I am of the opinion that if the existence of the alleged contract were established the alleged liability, if any exists, would attach to the municipality of Manila, and would not attach to the military government of the Philippines nor the Federal Government of the United States. The municipality of Manila is a municipal corporation, and, as such, may be sued in the courts. The controversy between Messrs. Merryweather & Sons and the city of Manila stands on the same footing as a like controversy between individuals. The questions involved are of a kind and character usually resolved by judicial proceedings. Therefore the parties secure an adequate remedy by applying to the courts.

Ample provision has been made by the military government of the Philippines for the protection of the rights of Messrs. Merryweather & Sons under the alleged contract, by the continuance of the established laws under which the contract was made, if at all, and by the establishment of competent courts whose decree will be enforced by the executive department.

Yours, very truly,

ELIHU ROOT, *Secretary of War.*

THE SECRETARY OF STATE.

This matter being again presented to the Secretary of War, the final action of the War Department thereon was as follows:

MARCH 7, 1901.

SIR: I have the honor to acknowledge the receipt of your letter of January 19, 1901, referring to the claim of Merryweather & Sons for damages occasioned by a refusal to accept certain fire apparatus under the terms of a certain contract with said Merryweather & Sons, alleged to have been entered into by the city of Manila, P. I., while that city was under Spanish sovereignty.

I have already determined that since the local authorities deny the creation of the alleged contract, I will not arbitrarily order the payment of damages resulting from an alleged violation of said disputed contract; and since the local authorities insist that the apparatus is not fitted for the needs of the city, I will not arbitrarily order the purchase thereof by the city; nor will I exercise judicial powers and hear and determine the disputed questions arising between Merryweather & Sons and the municipality since both parties are competent to sue and be sued in the courts of the Philippines. (See letter dated December 6, 1900.)

Further consideration of this matter as relating to an existing or alleged liability of the municipality of Manila will not be attempted by this Department.

Inclosed in your letter is a copy of a communication from Merryweather & Sons, dated January 8, 1901, wherein it is stated that application to the courts is not open to them, for the reason as set forth in said communication, "that the refusal to accept the fire apparatus contracted for was not made by the municipality of Manila, nor by Messrs. Aldecoa & Co., but by the United States military governor of the Philippine Islands."

In support of this declaration there is set forth a copy of the notice received by Merryweather & Sons, reciting that the provost-marshal-general is instructed by the military governor to inform Messrs. Merryweather & Sons "that the military governor of the city does not desire the fire apparatus." \* \* \*

The military occupation of the islands by the United States being accomplished, the authority to administer the affairs of civil government passed, under the laws of war, to the commander of the occupying force. To properly administer said affairs, said commander duly designated certain persons to perform the duties appertaining to certain offices, among others the offices of the municipality of Manila. These incumbents so installed in municipal offices were as fully authorized to act for the city and to bind the municipality thereby as were their predecessors. If the action of these municipal officers in this instance created a liability which would attach to the city under ordinary conditions, the liability attached under the extraordinary conditions then existing. (*New Orleans v. Steamship Co.*, 20 Wall., 387.)

Messrs. Merryweather & Sons, in their communication dated January 8, 1901, addressed to the ambassador of the United States, elect to consider the Federal Government of the United States as being the one liable to them for the alleged damages. This claim, therefore, becomes one for unliquidated damages resulting from an alleged interference by the military authorities of the United States with the performance of an alleged contract between said concern and the city of Manila. As the War Department was not a party to said alleged contract, the Secretary of War is without authority to settle and adjust the claim.

Were a claim of this character presented to the War Department by a citizen of the United States, the extent of the service which the Secretary of War could perform for the claimant would be to transmit the claim and accompanying documents to Congress.

In the instance under consideration the Secretary of War can not perform even this service, for the claimant is not a citizen of the United States, but is an alien.

At the close of the civil war a large number of "alien claims" were presented to Congress. In 1874, upon the recommendation of the committee on alien claims, Congress assumed the position that the right of petition guaranteed by the Constitution enabled a citizen of the United States presenting a claim against this Government to Congress to demand the consideration of said claim as a *right*; that said privilege did not extend to aliens; and thereupon Congress declared that claims of aliens can not properly be examined by a committee of Congress, there being a department of this Government in which most questions of an international character may be considered—that which has charge of foreign affairs; that Congress can not safely and by piecemeal surrender the advantage which may result from diplomatic arrangements; that this has been the general policy of the Government, and Congress has not generally entertained the claims of aliens, and certainly should not unless on the request of the Secretary of State.

(See Report No. 498, Committee on War Claims, first session Forty-third Congress, May 2, 1874.)

Said report also contains the following letter:

"DEPARTMENT OF STATE,

"Washington, April 22, 1874.

"SIR: In reply to your telegram, stating that claims are presented by French citizens and other aliens through Congress to the Committee on War Claims, I have to remark that such presentation is entirely inconsistent with usage, which requires that aliens must address this Government only through the diplomatic representatives of their own governments.

"This Department refuses to entertain applications or to receive claims from aliens except through a responsible presentation by the regularly accredited representative of their government.

"I have also been under the impression that Congress refused to receive petitions or claims from aliens. Such, I am advised, was at one time the rule of the House of Representatives, and such is the rule at present in the Senate, I am informed. The propriety of the refusal to allow an alien to intrude his claims upon Congress can not be questioned.

"I have the honor to be, sir, your obedient servant,

"HAMILTON FISH.

"Hon. WM. LAWRENCE,

"House of Representatives."

I am unable to discover that the practice thus established has been abandoned. It therefore seems advisable for this Department to conform thereto.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

THE SECRETARY OF STATE.

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**THE CLAIM FOR \$30,000 PRESENTED BY THE AMERICAN MAIL STEAMSHIP COMPANY FOR SERVICES RENDERED THE UNITED STATES IN TOWING THE UNITED STATES ARMY TRANSPORT M'PHERSON TO HAMPTON ROADS.**

[Submitted May 28, 1900.]

SYNOPSIS.

1. The property of the United States Government, rescued from the perils of the sea while in the possession of officials of that Government, is not liable to a lien for salvage.
2. The United States having received the services and resulting benefits is liable for compensation, the measure of compensation being the fair and reasonable value of the service rendered under the conditions existing at the time and place of service, and can not include any reward in the nature of salvage.

SIR: I have the honor to acknowledge the receipt of your request for a memorandum on the legal questions involved in the claim for \$30,000 presented by the American Mail Steamship Company for services rendered the United States in towing the U. S. A. transport *McPherson* to Hampton Roads. In compliance with said request I have the further honor to report as follows:

In order to avoid possible misunderstanding it is necessary to state the case as it presents itself to my mind upon examination of the papers submitted and the *character of the claim therein presented*. It appears that on February 19, 1900, the U. S. A. transport *McPherson*, homeward bound, while off the coast of North Carolina, became disabled by the breaking of the tail shaft in the stern tube. Thus disabled the ship could not be steered and was at the mercy of the wind and waves, and so continued until February 23, 1900, when it was sighted by S. S. *Admiral Sampson*, belonging to the American Mail Steamship Company, the claimant.

The *Sampson* saw the signals of distress which the *McPherson* was flying and approached the latter vessel. At 11.03 a. m. the *Sampson*

was within speaking distance of the *McPherson* and its disabled condition made known. (See affidavit of L. H. Higgins, master of the *Sampson*.) The *McPherson* requested the *Sampson* to tow it into Hampton Roads. A consultation was had on board the *Sampson*, which resulted in the *Sampson* undertaking the service requested. A hawser was passed from the *McPherson* to the *Sampson*, and at 12.43 the *McPherson* started ahead under tow. (See log of *McPherson*.) The ships arrived in Hampton Roads on the morning of February 24, where the *McPherson* dropped anchor at 8.30 a. m. (See log.) The attendant circumstances and conditions under which the *Sampson* performed this undertaking make it a salvage service of highly meritorious character. Under these conditions the owner of the *Sampson* is entitled to compensation, and if the *McPherson* were owned by an individual or private association the claimant could proceed to recover salvage by libeling the *McPherson* and its cargo by a proper action in admiralty. Such proceeding is *judicial*, and the steamship company could no more conduct it in the War Department than it could an action to condemn private property for the use of the company.

The court of admiralty *alone* has jurisdiction to try a question of salvage. (*Houseman v. The Schooner North Carolina*, 15 Pet. 40, 48.)

This Department is bound to consider this claim as founded on a contract or not consider it at all.

Not being able to libel the property of the United States by an exercise of the powers belonging to the War Department, the steamship company has recourse to a claim for compensation for services rendered under contract, and abandons the position of a *salvor* to assume that of a contractor.

Very different rules govern the determination of salvage than govern questions arising on contract.

Salvage is a compensation *given by maritime law* for services rendered in saving property from impending peril on the sea or other water where interstate or foreign commerce is carried on. In awarding salvage the points in controversy are, were the services of a kind and character to create a liability for salvage, and if so, how much is due and between whom and how shall it be divided? Usually the amount found due is apportioned between the owner of the vessel and the crew performing the service.

There are no fixed rules for the determination of these questions in the United States, and they are left to the sound discretion of the court of admiralty. Being lodged in that court, such discretion can not be exercised by the Quartermaster-General of the Army nor the Secretary of War. Salvage is always unascertained, *i. e.*, unliquidated, until fixed by the court, and claims therefor are without the jurisdiction of this Department.

It is true that a person whose property is liable to a claim for salvage

may settle or adjust the claims of his benefactors without going into court. This presents the question: Is the personal property of the United States liable for salvage? The rule announced by the United States Supreme Court is that when the property is not in the possession of the United States, but has been surrendered to a common carrier contracting to deliver the goods on his own responsibility, and rescued while in such custody, the property is liable to a lien for salvage. The right to such lien is limited to property not in the possession of the United States, because the court is without the power to bring the United States into court and adjust the lien and enforce its orders in regard thereto where the United States is a direct party to the action, unless Congress has authorized the court so to do.

The theory on which the court proceed seems to be that by parting with the custody or physical possession of the property the United States places it in such condition that the lien attaches and the property comes into court so burdened; that when the United States seeks to recover the property it does so as a plaintiff, and thereby waives its exemption as sovereign and voluntarily assumes the position of an ordinary suitor. (The *Davis*, 10 Wall., 15, 21; The *Siren*, 7 Wall., 152; The *United States v. Wilder*, 3 Sumner, 308; *Briggs v. The Lifeboats*, 11 Allen, 158; *Marvin on Wrecks and Salvage*, sec. 122; 1 Parsons, *Maritime Law*, 324; 2 *id.*, 625.)

In the instance with which we are now dealing the property was in the possession of the United States at the time of the rescue, and it would seem to follow that the lien for salvage did not attach.

If I am mistaken in this and such lien did attach, the possessor of the lien must present his claims to a court of admiralty.

Before leaving the subject of salvage it is necessary to call your attention to the rights and claims of the crew participating in the rescue. These persons are not before the Department, and any settlement of salvage claims of the owners would not bar the claims of the crew unless the owners are now authorized to act for them in said matter. So important are these salvage rights of seamen considered that Congress has provided that—

Every stipulation by which any seaman consents \* \* \* to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative. (Sec. 4535, Rev. Stats.)

The purpose in giving salvage is twofold—to reward services performed and stimulate like services in the future. As the court say in *The Baker* (25 Fed. Rep., 774):

The peril, hardship, fatigue, anxiety, and responsibility encountered by the salvors in the particular case; the skill and energy exercised by them; the gallantry, promptitude and zeal displayed—are all to be considered, and the salvors are to be allowed such a generous recompense as will encourage and stimulate similar services in others.

The services and attributes above referred to pertain more largely to the crew than to the owner of the rescuing vessel. The owner of

the rescuing ship is to be compensated for the use of his property and its hazard, but he is not entitled to receive the reward given his seamen for gallantry in rendering succor to another ship at sea.

It will be necessary to remember this in determining what is to be included in fixing the owner's *quantum meruit* under the implied contract relied upon herein.

This brings us to the consideration of the claim as I understand it is presented, namely, an account for services rendered the United States under an implied contract to pay therefor.

The United States having received the services and resulting benefits, is required to pay for them the same as though performed pursuant to a written contract. The liability exists in the absence of a written contract; the difference being that when the contract is duly entered into and reduced to writing the United States is bound by the price agreed upon by its officers; but when the contract is not in writing, the person performing the service is required to accept a fair and reasonable compensation for such services as he actually performs. (Clark v. United States, 95 U. S., 539; Wilson v. United States, 23 C. Cls. R., 77, 81.)

In order to have its claims considered by the War Department, it is necessary for the steamship company to take the position that it was a contractor, acting in pursuance of an existing contract to perform the service for the *McPherson*. This being true, not only does the company cease to be considered a salvor, but it also eliminates from consideration the special features which give the service a salvage character, such as gallantry, skill, courage, promptitude, peril to life and property by which the service was accomplished. These are important matters to be considered in fixing the reward given to salvors, but are not considered in paying contractors for complying with their contracts. Contractors are not *rewarded*; they are *paid*.

If prior to the performance of this service by the *Sampson* the steamship company had entered into a written contract with the Government that for a designated sum it would perform the service, the fact that in order to carry out the contract the ship and crew render such service as in the absence of the contract would entitle them to a salvage would not authorize the Quartermaster-General to pay the company more than the stipulated price. If the contrary is true, why may he not exercise a like authority and reward a teamster in his department for gallant and meritorious conduct? The power to devote the money belonging to the United States to the payment of *rewards* is vested in Congress.

The only way the Quartermaster-General can acquire jurisdiction to consider this claim is to treat it as being for services rendered under a contract to perform the services under the actual conditions existing at the time they were performed, but which contract did not fix the price to be paid.

The question is then narrowed to the inquiry as to what would be the market price for such service. To arrive at this, it is proper for the Quartermaster-General to consider the matter as though the exigency permitted him to advertise for bids for the performance of the work of relieving the *McPherson* from the situation in which it was involved at 10.30 a. m. February 23, 1900.

The bids being received and opened, the Quartermaster-General, in passing upon the question of their being fair and reasonable, would consider two things: (1) The ordinary charge for towage in ordinary weather; (2) the amount to be added for increased service occasioned by the condition of the wind and sea and the ability of the *McPherson* to float with its cargo intact.

The service rendered by the *Sampson*, involved herein, began not earlier than 10.30 a. m. February 23, 1900, when the *Sampson* first sighted the *McPherson*, and ended not later than 8.30 a. m. February 24, 1900, when the *McPherson* dropped anchor in Hampton Roads.

The condition of the sea and weather during this period was as follows (see log of the *McPherson*):

FEBRUARY 23, 1900.

4 a. m.—Strong to heavy gale; tremendous heavy sea; ship rolling and laboring heavily.

6 a. m.—Moderate gale; heavy beam sea; ship rolling heavily.

10.30 a. m.—Sighted S. S. *Admiral Sampson*; hoisted signals asking to be taken in tow. Answered yes. Drifted buoy with small line attached. Sent end of steel cable on board.

Noon.—Lat. 34° 33 N., long. 74.25 W. Strong breeze, rough sea, and overcast. Cape Henry N. 29, W. 162 miles.

12.45 p. m.—Started ahead under tow. Streamed log.

2 p. m.—Wind and sea increasing.

5 p. m.—Moderate gale; rough, confused sea; overcast.

6.30 p. m.—Diamond Shoal L. V. abeam, dist. 6 miles.

7.30 p. m.—Hatteras light abeam, dist. 6½ miles. Clear, strong breeze; sea moderating and getting smooth by degrees.

10.50 p. m.—Boodi Island light abeam, dist. 12 miles. Fresh breeze; clear, smooth sea.

SATURDAY, FEBRUARY 24, 1900.

Gentle breeze; clear sky; smooth sea.

2.15 a. m.—Currituck light abeam, dist. 14 miles.

6.35 a. m.—Stopped to take pilot and proceeded.

6.45 a. m.—Cape Henry abeam. Reported ship.

8.30 a. m.—Dropped anchor, Old Point Comfort light-house.

The attention of the Quartermaster-General is directed to the statement in affidavit of the master of the *Sampson*, that the engines of the *Sampson* were "slowed down" at 11.03 a. m. and the *Sampson* maneuvered to get under the stern of the *McPherson*. Arriving within speaking distance, a colloquy took place between the officers of the respective vessels, and after a conference on board the *Sampson* a hawser was passed and fastened. The log of the *McPherson* shows that the ship "started ahead under tow" at 12.45 p. m. of that day.

It is not only proper but necessary for the Quartermaster-General to



consider these things, for the bids are supposed to have been made with reference thereto.

In further consideration of this matter as being determined by passing upon bids, attention is directed to the fact that no consideration would be given to the *cost* or *property value* of the *Sampson*. The ability of the ships tendered to perform the service required would be considered, but those having the required capacity would stand on an equal footing without regard to their financial value.

Nor could it be considered that in performing the service for which the bids were submitted the *Sampson* would be obliged to temporarily abandon its regular employment and sustain a loss thereby. Such matters are proper enough for the *owners* to consider, but are not within the limited powers of an officer of the United States charged with disbursing the public funds specifically appropriated for a particular purpose and subjected to specific methods, *unless* there is now at the disposal of the Quartermaster-General a fund which he is at liberty to expend as a *bonus* under the exceptional conditions presented by this case. As to the existence of such a fund I am not advised. It would not be proper for the Quartermaster-General, in the exercise of his limited powers in such matters, to consider that it would be to the financial benefit of the United States to pay \$30,000, or any other sum, rather than lose the transport. Compensation for services is not fixed by that rule where the laws of humanity or civilization are respected. The law does not permit even salvors to say to shipwrecked unfortunates: "How much is rescue worth to you?" Even in salvage cases the question is what is just and reasonable, and the courts frequently set aside positive contracts for the payment of a specified sum to rescuers when found to be unreasonable. (*Houseman v. The North Carolina*, 15 Pet., 40; *Good Intent v. Atlantic Insurance Co.*, 109 U. S., 110, 117.)

The loss and damage occasioned the steamship company by reason of the *Sampson* grounding in the harbor at Jamaica can not be considered by the Quartermaster-General. At best they are unliquidated damages, with which he is not authorized to deal. Such damages are also too remote to create a liability on the part of the United States. If entrance to said harbor is hazardous both by day and night, the damage was not occasioned by the United States any more than are the ordinary perils of the sea. If entrance to the harbor was dangerous only at night, it was the duty of the ship's master to remain outside until daylight. If the weather did not permit this to be done, then, again, the entrance became an ordinary peril of the sea, for which the United States could not be held liable. It seems very plain that this alleged loss and damage can not be considered by the Department when it is remembered that the Quartermaster-General is compelled to deal with this steamship company as possessing only the rights of an ordinary contractor or not deal with it at all. Would an ordinary contractor whose vessel went aground while he was returning

to port after performing his contract be entitled thereby to have his contract price increased?

The Quartermaster-General can not consider the loss and damage asserted to have been occasioned by the bananas awaiting shipment on the *Sampson* ripening during the delay of two days resulting from the *Sampson* deviating from its course. The showing now made does not disclose the amount of said damage, nor does it disclose that the fruit was owned by the steamship company. (See letter of Neale of May 4, 1900.) It does appear from said letter that when the *Sampson* grounded in the harbor it was so severely injured that it was obliged to return to New York "in ballast."

As stated above, the United States is not to be held responsible for the *Sampson* being stranded, and it does not appear that if the *Sampson* had not run aground the prospective cargo would have reached its proposed market in a marketable condition. The damage to the fruit seems to have resulted from the accident to the *Sampson*.

The adjudicated case known as *The Akaba* (54 Fed. Rep., 197) has no application to claims of the character of the one under consideration and the procedure now being taken thereon by the Department.

The *Akaba* case was a proceeding in admiralty to secure salvage by judicial determination of the rights of individuals under maritime law. The claim under consideration is presented to the Quartermaster-General of the United States Army for services rendered under a contract with the United States.

The decision in the *Akaba* case was rendered by a reviewing court (United States circuit court of appeals, fourth circuit), and the only questions decided were (1) that the testimony showed the services rendered were salvage services, and (2) that a reviewing court will not disturb the amount of salvage awarded by the trial court "unless for some violation of just principles or for clear and palpable mistake or gross overallowance." It is a well-known rule of law that an appellate court will not reverse decrees as to the amount of salvage except for some clear mistake or gross overallowance. (8 Wall., 448; 10 Wheat., 306; 10 Pet., 108; 108 U. S., 352; 122 U. S., 256.)

I fail to see how this rule of conduct prescribed for themselves by appellate courts when reviewing the action of inferior courts in salvage cases is to be applied to the proceedings in this Department on claims of the character of the one under consideration.

One thing appears in the opinion in the *Akaba* case which bears upon the claim now being considered. The *Akaba* was rescued by the *City of Birmingham*. From the statement of the case it appears (54 Fed. Rep., 198):

Just after these two reached an anchorage and the *Akaba* had let go her anchor, but before the line between her and the *City of Birmingham* was let go, the latter steamship came into collision with the British steamship *Gordon Castle*, riding at anchor. \* \* \* Both vessels suffered greatly.

Regarding this, the court say (p. 199-200):

In the evidence taken in the case items of damage caused by the collision of the salving vessel with the *Gordon Castle* appear. The court below alludes to a part of the expense incurred by the *City of Birmingham*, but in its findings it gives a lump sum without discussing this collision or the responsibility of the salved vessel therefor, or stating whether it includes these damages among the expenses. We approve the sum found, *but we express no opinion on this point*. Indeed, the record does not disclose to what extent the towage of the *Akaba* contributed to the collision.

That the court saw fit to call attention to the fact that it did not pass upon this point, and to explain that it could not do so on account of the condition of the record in that case, is an admonition, if not an instruction, that an item of damage so arising is at least doubtful even in salvage cases.

If I have made my views understood it will be seen that they limit the discretion of the Quartermaster-General to that exercised by him in accepting or rejecting bids when actual competition is made, eliminating from consideration the special features which increase the compensation by adding a reward, and also the indirect damages alleged.<sup>a</sup>

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The views set forth in the foregoing report were approved by the Secretary of War, and the Quartermaster-General was instructed to settle said claim pursuant thereto.

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<sup>a</sup>This matter being referred to the Comptroller of the Treasury, he determined it as follows:

"As the transport *McPherson* was in the possession of the United States at the time the services were rendered, it is well settled that the vessel can not be libeled in an admiralty court to sustain or enforce the claim for salvage. This claim, therefore, must be considered, if at all, as one arising under an agreement in the nature of a contract in which everything was agreed to between the parties except as to the amount of compensation.

"While there is no written contract, as required by section 3744, Revised Statutes, yet as the agreement has been executed the claimant is clearly entitled to a reasonable compensation for the services rendered.

"In the very able opinion of Judge Magoon, law officer, Division of Insular Affairs, War Department, he says:

"In order to have its claim considered by the War Department it is necessary for the steamship company to take the position that it was a contractor, acting in pursuance of an existing contract to perform the services for the *McPherson*. This being true, not only does the company cease to be considered a salvor, but it also eliminates from consideration the special features which give the services a salvage character, such as gallantry, skill, courage, promptitude, peril to life and property by which the service was accomplished. These are important matters to be considered in fixing the reward given to salvors, but are not considered in paying contractors for complying with their contracts. Contractors are not *rewarded*; they are *paid*."

"The opinion also clearly sets forth the principles to be applied in determining what the reasonable value of the services has been. The simple question then is, What were the services worth to the steamship *Admiral Sampson*? What would reasonable and fair-minded men have charged for said services under all the circumstances of the case, applying the principles set forth by Judge Magoon?" (7 Dec. Comp. of Treas., 365, 366.)

## THE SALARY OF THE GOVERNOR-GENERAL OF CUBA AND ITS PAYMENT OUT OF THE REVENUES OF CUBA.

The gentleman who is the governor-general of Cuba is an officer in the United States Army. He is discharging the duties of two separate and distinct offices—the one military and the other civil. One office is that of a major-general in the United States Army; the other is that of the head of the government of civil affairs in the island of Cuba. As a major-general of the Army he is in command of the military forces of the United States stationed in Cuba. This force consists of 443 officers and 9,152 men, making a force of 9,595 men—nearly one-half the size of the Regular Army at the time the pay of officers was fixed by Congress. These troops are stationed at various points throughout the island. It is doing Major-General Wood scant justice to say that in the discharge of his military duties connected with this military establishment he is earning his pay as an officer in the United States Army.

As the head of the government of civil affairs in the island of Cuba he is discharging a multitude of duties arising in the administration of all departments of civil government in the island.

In the conduct of the military affairs committed to his charge and keeping he renders service to the United States.

In the conduct of the affairs of civil government committed to his charge and keeping he renders service to the people of Cuba.

The conduct of the affairs of civil government are not the ordinary duties of an officer of the United States Army as specially defined by the laws creating and regulating the military establishment of the United States. On the contrary, the performance of such service by an officer of our Army is *tolerated*, not *required*, and must be justified by necessity. “He is no friend to the Republic who advocates the contrary.” (Dow v. Johnson, 100 U. S., 153, 169.)

Being outside of the duties prescribed for a major-general by the law creating his office, the performance of said duties would be extra services, for which he would be entitled to extra compensation in the absence of positive legislation prohibiting such payment.

In *Gratiot v. United States* (15 Peters, 370, 371) the United States Supreme Court say:

It is not sufficient to establish that these items ought to be rejected, that there is no positive law which expressly provides for or fixes such allowances. There are many authorities conferred on the different departments of the Government which for their due execution require services and duties to be performed which are not strictly appertaining to or devolved upon any particular officers or which require agencies of a special discretionary nature. In such cases the department charged with the execution of the particular authority, business, or duty has always been deemed, incidentally, to possess the right to employ the proper persons to perform

the same as the appropriate means to carry into effect the required end; and also the right, when the service or duty is an extra service or duty, to allow the persons so employed a suitable compensation. This doctrine is not new in this court, but it was fully expounded in the cases of *The United States v. McDaniel*, 7 Peters, 1; *The United States v. Ripley*, 7 Peters, 16; and *The United States v. Fillebrown*, 7 Peters, 28.

But it is said that section 1269, Revised Statutes of the United States, prohibits the payment of compensation for services of the kind and character now being performed by the head of the government of civil affairs in Cuba. I can not agree to this proposition.

Section 1269 is as follows:

No allowances shall be made to officers in addition to their pay except as herein-after provided. (U. S. Rev. Stat., p. 220.)

What was the purpose of this enactment? Was it intended to limit the income of the officers of our Army from all sources whatsoever to the amount fixed by law as their pay? If an officer in the Army were to write a book on his military experiences, would he violate the law if he sold it to a publisher or the general public? Does this statute prohibit him from increasing his income? If so, it is a palpable invasion of the rights of man, for a soldier is a man, and by entering the military service surrenders only a portion of his civil rights.

Manifestly the purpose of this enactment is to limit the amount which an army officer may draw from the Treasury of the United States or the money appropriated from the United States Treasury for the support of the Army. As such it is a wise and useful provision, for it enables Congress to fix the amount to be appropriated, prevents the recurrence of annual deficits, and results in a saving to this Government.

If such a purpose were not palpable, additional evidence is to be found in the fact that the provisions of section 1269 were created by an act approved July 15, 1870 (see marginal note to sec. 1269), which act was entitled—

An act making appropriations for the support of the Army for the year ending June 30, 1871, and other purposes. (16 U. S. Stats., p. 315.)

Section 1269 is a continuation of a provision of section 24 of said act. (See note to sec. 1269.) Said section 24 fixes the amount of pay of the various officers of the Army and then provides as follows:

And these sums shall be in full of all commutation of quarters, fuel, forage, servants' wages and clothing, longevity rations, and all allowances of every name and nature whatever, and shall be paid monthly by the paymaster. (16 Stats., p. 315.)

Plainly the inhibition relates exclusively to the funds of the United States in the hands of the paymasters—that is to say, the money appropriated by Congress for the support of the Army.

Are the funds created by the revenues now being collected by the

government of civil affairs in Cuba funds belonging to the United States?

Certainly they are not. These revenues are collected by the existing government of Cuba for the purpose of defraying the expenses of maintaining said government. They are in no sense military contributions or requisitions demanded by a successful invader for the use and benefit of the treasury of his own government.

The Brussels Project of an International Declaration Concerning the Laws and Customs of War provides as follows:

ARTICLE 5. The army of occupation shall only levy such taxes, dues, duties, and tolls as are already established for the benefit of the State or their equivalent, if it be impossible to collect them, and this shall be done, as far as possible, in the form of, and according to, existing practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as was obligatory on the legal government.

Lieber's Instructions for the Government of Armies of the United States in the Field (G. O., 100, A. G. O., 1863) provides as follows:

10. Martial law affects chiefly the police and collection of public revenues and taxes, whether imposed by the expelled government or by the invader. \* \* \* (Sec. 1, par. 10.)

9. The salaries of civil officers of the hostile government who remain in the invaded territory and continue the work of their offices and can continue it according to the circumstance arising out of the war—such as judges, administrative or police officers, officers of the city or communal governments—are paid from the public revenue of the invaded territory until the military government has reason wholly or partially to discontinue it. (Sec. 2, par. 9.)

If such revenues can be properly used to pay for services rendered by enemies, is it a misappropriation to use them to pay for similar services rendered by those who are not enemies?

The case of *Converse v. United States* (21 How., 463) seems to be directly in point on the question involved in this discussion.

That case arose as follows:

Philip Greely, jr., was collector of customs at Boston. After his death the United States brought suit against his estate. James C. Converse, the administrator of the estate, pleaded certain items of set-off amounting to \$17,684.92 as commissions due him from the United States upon certain contracts, purchases, and disbursements made by him for oil and other articles for the Light-House Service of the United States, under direction of the Secretary of the Treasury. No objection was made that said amount was not the proper commission if the defendant was entitled to any; but the United States contended that the defendant had no rightful claim for said commissions, since it was conceded that being collector of customs, and, as such, having received the compensation fixed by law, to wit, \$6,000 and \$400 additional, each year, he was prohibited by the statutes from receiving anything more. This contention was sustained by the United States circuit

court, but upon appeal to the United States Supreme Court the case was reversed.

The provision of law upon which the Government rested its contention was as follows:

No collector, surveyor, or naval officer shall ever receive more than \$400 annually exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity. (Sec. 18, act 1822, 3 Stats., 696.)

This provision was substantially reenacted prior to the service performed by the defendant, in the following acts: 1839, 3 Stat., 439; 1841, 5 Stat., 432; 1842, 5 Stat., 510; 1845, 5 Stat., 736; 1848, 9 Stat., 297; 1849, 9 Stat., 365, 367; 1850, 9 Stat., 504, 542, 543; 1851, 9 Stat., 629; 1852, 10 Stat., 97, 100; 1852, 10 Stat., 119, 120.

In passing upon the case the Supreme Court considered and construed these various laws on the same subject-matter in connection with each other.

In the opinion the court say (21 How., 467 et seq.):

It would extend this opinion to an unreasonable length to quote at large the language of the various acts and provisos above mentioned; nor indeed do we deem it necessary, because the object and policy of this whole legislation, when taken together, will be made evident by looking to the state of the law before and at the time the different laws were passed, and the defects which then existed, and which they were intended to remedy. A particular reference to a few of them, in chronological order, will be sufficient for this purpose, and we shall refer to those which have been mainly relied on by the circuit court, or by the counsel for the United States, in order to support the judgment of the court below.

The first law upon this subject is the act of May 7, 1822, section 18, which provides that "No collector, surveyor, or naval officer shall ever receive more than \$400 annually exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity.

At the time this law was passed the collectors, surveyors, and naval officers were, in certain contingencies mentioned in the act of March 2, 1799, required to do the duties of the offices of each other; and, without any special law upon the subject, it was the settled practice and usage of the Government to require collectors to superintend lights and light-houses in their respective districts, and to disburse money for marine hospitals and the Revenue-Cutter Service, for which, by the practice and regulations of the Treasury Department, they were allowed certain commissions. But there was no act of Congress imposing these duties on the collector or fixing his commissions for these services and disbursements. They were charged as extra services—that is, as not belonging to the office of collector—and the amount of his compensation depended altogether upon the discretion of the Secretary of the Treasury for the time being. These extra allowances in some instances amounted to very large sums, and it appears that the attention of Congress was at length attracted to this subject, and it was deemed right and more consistent with the nature and character of our institutions to fix by law the compensation for these services, and not leave it in every case to depend upon the discretion of the Secretary, and the act of 1822 was accordingly passed for that purpose and for that purpose only. The language is clear, precise, and appropriate, and no multiplication of words could more plainly indicate its object. The words "any other office" were evidently used

with reference to the contingencies in which one of these officers might be required to perform the duties imposed by law on one of the others. And the words "or other capacity" were equally essential, in order to embrace the extra allowances made for the agency of which we have spoken, as they were not the duties of an office created by law, but a mere agency of one of the departments of the Government. The law does not forbid compensation for extra services which have no affinity or connection with the duties of the office he holds. On the contrary, it recognizes his right and gives the collector or other of these revenue officers an additional sum, over and above their salaries as officers, for extra services rendered as agents, which had no legal connection with their respective offices.

The duties for which this certain compensation was fixed were well known in the usages and practice of the Government, and Congress could therefore act advisedly and with knowledge, and judge what amount of money would be a fair compensation. But it will hardly be supposed that Congress, by this law, intended to fix this amount for every unforeseen and possible service, or the duties of every possible office which one of these revenue officers should be directed or requested by the Secretary in some emergency to fill, for, as Congress could not foresee what might be the character and importance of such a duty, there was no basis on which a judgment of its value could be formed. Nor can it be supposed that they intended to regulate in advance its compensation or value without some data to act upon.

Besides, no other salaried officer is mentioned in this law but collectors, surveyors, and naval officers, and it would hardly be just to the legislative body to impute to it the design of dealing more harshly with these revenue officers than any other officers of the Government who have certain salaries, or to suppose they would deny to them compensation in cases where every other salaried officer was allowed to claim and receive it.

We have dwelt more particularly on this act of Congress, because the principles and policy on which it was passed form the basis of all the subsequent legislation on this subject, and will be found, with some modification, in every law. The great object has been to establish, by law, the compensation for public services, whether in offices or agencies, where the nature and character of the duties to be performed were sufficiently known and definite to enable Congress to form an estimate of its value, and not leave it to the discretion of the head of an executive department.

After this act of 1822 there is no act of Congress bearing upon the question until 1839. In the meantime, about the year 1833, and subsequently to that time, several cases came before the Supreme Court, in which officers who were not named in the act of 1822, but who received a fixed salary as a clerk in a department, or a fixed compensation as an officer in the Army, or in some other office, claimed the right to set off against the United States compensation for extra services undertaken by the direction of the Secretary, and for which there was no fixed compensation by law. And in these cases this court held that such compensation might be claimed and set off under the act of Congress allowing set-offs against the United States; and that, where the extra service had been required by the head of the proper department, the officer was entitled to a reasonable compensation, to be allowed by the jury upon the evidence, even if there was no law expressly requiring the service or fixing compensation for it; and that it might be ascertained and allowed by the jury in proper cases, under the direction of the court, even if the head of the department had fixed no compensation, and refused to allow the claim.

Under these decisions, claims of this description were frequently made, and the United States involved in inconvenient controversies in court. These controversies again attracted the attention of Congress to the subject of compensation for extra services, and in 1839 they passed an act embracing all persons holding office with a fixed salary precisely similar in its principles with the act in relation to custom-house officers—that is to say, they took away from the heads of departments and



from courts and juries the right to fix the compensation in any case where it was not fixed by law; and if there was no law ascertaining the compensation or allowance for the particular service the party was entitled to none. It carries out the principle and policy of the act of 1822, and provides that there shall be no compensation in addition to the salary, "unless said extra allowance or compensation be authorized by law."

Nor does the act of August 23, 1842 (5 Stat., 510), go further than the act of 1839, except only in declaring that, in order to entitle the party to demand compensation, it must not only be fixed by law but that the law appropriating it shall explicitly set forth that it is for such additional pay, extra allowance, or compensation. Now, these words, added to the provisions in the act of 1839, only show that the Legislature contemplated duties imposed by superior authority upon the officer as a part of his duty, and which the superior authority had in the emergency a right to impose, and the officer was bound to obey, although they were extra and additional to what had previously been required. But they can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law.

This provision is introduced in the annual appropriation law for the support of the Army and Military Academy. And although the words are general, and undoubtedly include officers in every branch of the public service, yet, from the general character and objects of this law, it is manifest that the attention of Congress must have been mainly directed to officers in the military service who, from the position in which unforeseen events often place them, are called upon and required to perform duties not specified by law or regulation, but which grow out of and are associated with military service.

We pass on to the acts of 1848 and 1849, which are the more important because they were passed about the time this collector came into office and apply particularly to the revenue officers of which we are speaking. The clauses which bear upon this question in each of these laws is inscribed in the annual civil and diplomatic appropriation law by way of proviso to the clause making appropriations to the maintenance of the Light-House Service. The act of 1848 appropriates \$11,640.35, being a commission of  $2\frac{1}{2}$  per cent on the whole amount appropriated for that service, with a proviso that no part of the sum thereby appropriated should be paid to any person who received a salary as an officer of the customs, and that from and after the 1st day of July, 1849, the disbursements should be made by the collector of the customs without compensation. And if this law still remained in force it is very clear that the agency of which we are speaking would not have been authorized by law, and the set-off claimed by the plaintiff in error could not be allowed.

But this proviso in the act of 1848 is recited at large in the appropriation of 1849, and repealed without any saving or qualification; and this repealing clause is immediately preceded by an appropriation for superintendents' commissions of \$11,673.25, being  $2\frac{1}{2}$  per cent on the whole amount appropriated for light-house purposes. There is no restriction in these commissions in relation to revenue officers. The commissions are to be paid on the whole amount, without any reference to the person or officer who performs the service; consequently, under this law, the revenue officer who performed this duty within his own district was entitled to  $2\frac{1}{2}$  per cent commission on the amount disbursed, and previous acts of Congress restricting this allowance were repugnant to this law and thereby repealed. The repeal of the act of 1848 could not, upon any sound principle of law, revive any previous act which was repugnant to the provisions contained in the repealing act of 1849. And this act allowed the commission of  $2\frac{1}{2}$  per cent in all cases, and appropriated the money to pay it, leaving it to the Secretary of the Treasury to select as agent each

collector for his collection district, or any other agent that he might deem more suitable for the trust.

The act of September 28, 1850, however, restored the provisions contained in the first act referred to—that is, the act of 1822—and provides that no collector shall receive for his services as superintendent of light-houses over the sum of \$400 per annum. But this act was followed by the civil and diplomatic appropriation law, passed at the same session, September 30, 1850, only two days after the law above mentioned, in which the compensation is again modified in amount, and collectors whose salary exceeds \$2,500 can receive no compensation as superintendent of lights or disbursing agent. Yet this law, like the preceding appropriation laws, appropriates a sum equal to  $2\frac{1}{2}$  per cent commission upon the whole amount appropriated for Light-House Service, and the Secretary might therefore employ any agent he pleased, and if he was not the collector he would be entitled to full commissions. The same provisions are contained in the appropriation acts of 1851 (9 Stat., 608), 1852 (10 Stat., 86), and 1853 (10 Stat., 200).

It will be seen from this history of the complicated legislation on this subject that however varying the provisions may be in some particulars they are yet all founded on the principles and policy of the acts of 1822 and 1839, and that all of the provisos respecting the commissions to a revenue officer are confined to his collection district and its extra customary duties therein as agent.

The just and fair inference from these acts of Congress taken together is that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws and the remuneration for them fixed by law. It was undoubtedly within the power of the Department to order this collector, and every other collector in the Union, to purchase the articles required for light-house purposes in their respective districts, and to make the necessary disbursements therefor. And for such services he would be entitled to no compensation beyond his salary as collector, if that salary exceeded \$2,500.

But the Secretary was not bound to intrust this service to the several collectors. He had a right, if he supposed the public interest required it, to have the whole service performed by a single agent; for while the law authorizes him to exact this service from the several collectors, it at the same time evidently authorizes him to commit the whole to an agent or agents other than the collectors, by regulating the commission which an agent shall receive, and appropriating money for payment of commissions of  $2\frac{1}{2}$  per cent upon the whole amount authorized to be expended in this service. And as the collectors would by law be entitled in some cases to nothing, and in others to the small sum above mentioned, if the service was performed by them in their respective districts, it is very clear, from the commissions allowed, and the appropriation to pay them, that he was at liberty to employ a different agency, and pay the commissions given by the law whenever he supposed the public would be better served by this arrangement.

And the case as assumed in the record is precisely that case. The Secretary has no right under the laws upon this subject to order this or any other collector to perform this duty for all the light-house and collection districts. The law has divided it among them, and the Executive Department had no right to impose it upon one. But he had a right, as we have said, to employ an agent instead of the collector or collectors of the several districts, and if he did employ one, the law fixed the compensation and appropriated the money to pay it. He was not forbidden to employ a revenue officer for this purpose; and, so far as his services were performed for other districts, he stood in the same relation to the Government as any other agent. The law forbidding compensation, or reducing it to a small amount, did not apply to this service. The agency was entirely foreign to his official duties, and far beyond the limits of the district to which the law confined his official duties and power. And

as the Department appointed him to perform a duty required by law, for which the compensation was fixed by law, and the money appropriated to pay it, he is entitled to the compensation given by law, if he has performed the duty, for the Secretary has no more discretionary power to withhold what the law gives than he has to give what the law does not authorize. The agency and services performed in this instance had no more connection with his official duties and position than the purchase of a supply of shoes for the troops in Mexico in the late war would have been in the absence of any other person authorized to make such a purchase. And if such a duty was requested or required of him by the head of the proper department and performed, nobody would deny his right to compensation, if the law authorized and required the service to be done and fixed the compensation for it.

Upon the case therefore, as the plaintiff in error offered to prove it, we think the court erred in refusing to admit the testimony.

Undoubtedly Congress have the power to prohibit the Secretary from demanding or receiving of a public officer any service in any other office or capacity, and to prohibit the same person from accepting or executing the duties of any agency for the Government, of any description, while he is in office, and to deny compensation altogether if the officer chooses to perform the services; or they may require an officer holding an office with a certain salary, however small, to perform any duty directed by the head of the Department, however onerous or hazardous, without additional compensation. But the legislative department of the Government have never acted upon such principles, nor is there any law which looks to such a policy, or to such unlimited power in the head of an executive department over its subordinate officers.

An illustration occurs to me which I think fairly exhibits the extent of the prohibition of section 1269, Revised Statutes.

It has been the custom for many years to detail officers of the Army to serve as military instructors at various educational institutions. (Sec. 1225, Rev. Stats.) In many instances such institutions were agricultural colleges directly endowed with land grants from the Federal Government upon condition that they afford instruction in military science. Suppose an officer detailed to teach military tactics at one of these institutions sees fit to arrange with the college authorities to act as a tutor in some other study—history, mathematics, or chemistry. He certainly could not receive compensation from the Treasury of the United States for such additional service, but does section 1269 prevent him from lawfully receiving compensation from the college?

Section 1260, United States Revised Statutes, provides as follows:

Any retired officer may, on his own application, be detailed to serve as professor in any college. But while so serving, such officer shall be allowed no additional compensation.

Does this section require that said officer so detailed must donate his services to the college? Can not he receive pay from the college as any other professor in the institution does?

Attorney-General Cushing said:

There is no provision in the Constitution or of any statute which forbids the performance of the duty of two distinct offices by the same person.

The various provisions of law forbidding extra allowance or additional pay for extra service imply extra service, pay, or allowance in the same office, not distinct service in distinct offices. (8 Op. A. G., 325; see also 5 Op. A. G., 765; 6 Id. 80 and 583.)

That the allowance of extra compensation to persons holding office under our Government is not contrary to the Constitution or theory of our Government is expressly recognized by Congress in numerous acts throughout our history, for the various acts prohibiting such extra compensation limit such prohibition by the words "unless expressly authorized by law." (See secs. 1763 and 1764, U. S. Rev. Stats.)

Or by the following language appearing in the act of May 1, 1876:

Unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. (19 Stat., 45.)

If "extra compensation" were opposed to the Constitution, the fundamental principles or the theory of our Government, it could not be authorized by Congressional enactment or legalized by an appropriation therefor.

To what law do we look in determining what action is authorized in Cuba? International law. That law not only "authorizes," it requires that the military commanders of a force which has driven out the previous government should assume and discharge the administration of civil affairs, and devote the revenues of the country to that purpose. Who makes the appropriation or distribution of the revenues for the accomplishment of that purpose? Clearly the commander in chief of the occupying army.

This is not the first Congress which has considered the propositions now before us. During the war with Mexico, and afterwards, President Polk exercised the right of distributing or appropriating the funds derived from the customs revenues of the country occupied by our armies. The money so secured was collected as military contributions or requisitions. It was seized as legitimate spoil of war, and held and intended for the use and benefit of the United States. In this respect it differed from the funds derived from the revenues being collected in Cuba, which are created, collected, and used for the use and benefit of the island itself.

Although the money secured by our military forces in the war with Mexico was money belonging to the United States, it was not converted into the Treasury of the United States, and President Polk used it, as his discretion determined, "toward defraying the expenses of the war," among which was included additional compensation to the officers of the Army performing services as civil officials.

The authority of President Polk to dispose of the funds so collected was challenged in Congress. (Congressional Globe, vol. 20, p. 57, Dec. 18, 1848.)

The matter was referred to a select committee, who submitted a majority report denying such authority in the President and a minority report sustaining the course pursued by President Polk. (See

Reports of Committees, 2d sess., 30th Cong. (1848-49), Report No. 119; see Message Pres. Polk to Cong., Jan. 2, 1849; Richardson's Comp., vol. 4, p. 672; see Discussion of Message, 20 Cong. Globe, p. 148 et seq.)

The course pursued by President Polk was finally sustained by Congress by the passage of an act approved March 3, 1849, entitled "An act to provide for the settlement of the accounts of public officers and others who may have received moneys arising from military contributions or otherwise in Mexico." (9 Stats., 412.)

It must not be forgotten that the moneys disbursed by order of President Polk belonged to the United States, and the officers who had received and disbursed the same were required to account therefor to the Treasury Department. Hence the necessity for the above-entitled act. In the instance with which we have to deal, the moneys do not belong to the United States.

Section 2 of the act above referred to is as follows (9 Stats., 413):

SEC. 2. *And be it further enacted*, That where an officer has had the supervision of the collection of the military contributions at any of the ports in Mexico, and has at the same time exercised civil functions under the temporary government there established, or where any officer or other person shall have performed the duties of collectors at such ports, such officer or person shall be allowed a compensation which shall be assimilated in amount, as nearly as may be, including the regular pay and emoluments of such officer, to that allowed by existing laws to officers of the customs in the United States where the services are similar in amount and importance, such allowance, in all cases to be determined by the President of the United States. And all officers of the Army and other persons in public employment who have received payment for their services in collecting, keeping, or accounting for said moneys, and for other necessary services, are authorized to retain so much of the amount so received as in the opinion of the President of the United States may be a fair compensation for said services.

#### THE STATUTE PROHIBITING OFFICERS OF THE ARMY FROM HOLDING CIVIL OFFICES.

Section 1222, United States Revised Statutes, provides as follows:

No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated.

This provision is intended to prevent officers of the military branch of the Government of the United States from holding office in the civil branch of the Government of the United States. It would be absurd to contend that it prevented an officer of the Army from complying with the law and usages of civilized warfare which require him to assume and discharge the duties of a civil officer in territory subject to military government. The officer who fills the position under military government does not exercise his own judgment or volition in

assuming it, but simply obeys the order of the commander in chief requiring him so to do.

In conclusion, allow me to direct attention to the fact that it is not contended herein that Congress may not regulate the military establishment of the United States. Such laws as Congress may enact in regard to such military establishment are binding upon the commander in chief and the officers and men composing such establishment, whether they are at home or abroad. But there is a distinction, plain and broad, between the military establishment of the United States and the government of civil affairs in the island of Cuba.

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**APPLICATION OF THE PURCHASERS OF THE SAN JUAN AND RIO  
PIEDRAS TRAMWAY FOR CONFIRMATION OF SALE AND  
TRANSFER OF CONCESSION, AND FOR CERTAIN PRIVILEGES  
DESIRED UPON COMPLETION OF TRANSFER.**

[Submitted January 26, 1900. Case No. 17, Division of Insular Affairs, War Department.]

SIR: I have the honor to submit the following report on the application of J. G. White & Co., Philip H. McMillan, S. Gilbert Averell, Frederic B. Jennings, W. H. Post, Lathrop R. Bacon, and Trenor L. Park, by their attorneys, Curtis, Mallet-Prevost & Colt, regarding a number of matters relating to the San Juan and Rio Piedras Tramway, in Porto Rico, and an adjunct organization known as the San Juan Light and Transit Company.

The application includes a number of matters of such character as to require separate examination. These matters have been presented at different times by a series of requests, all of which relate to the same general object or project.

**CONFIRMATION OF THE SALE AND TRANSFER OF THE CONCESSION AND  
TRAMWAY TO THE APPLICANTS.**

On February 16, 1878, the Crown of Spain granted a royal order authorizing Pablo Ubarri to build a tramway from San Juan to Rio Piedras, Porto Rico. (Gazette of March 14, 1878.) The conditions imposed by said royal order appear to have been complied with and the road thereafter constructed and operated down to the present time. The rights created by said concession and appertaining thereto were made the subject of a contract or sale to certain citizens of the United States, and the parties thereto applied to General Brooke, then in command of the military department of Porto Rico, for confirmation of the sale. Upon this matter General Davis, in his report hereon, says (Doc. 32, pp. 3 and 4, Ins. Div.):

The property with all its easements was sold by Mr. Ubarri on November 22, 1898, to William H. Thitchener, who represented an American syndicate. The sale

appears to have been in every way legal and a transfer of title was effected thereby. General Brooke was military governor at the time, and he was asked to confirm the sale, also to grant authority to change the motive power to electricity and to widen the gauge. There is no record of the action of General Brooke in this Department.

The question of approving the transfer was referred to the secretary of justice for the department of Porto Rico, who reported thereon as follows (Doc. 23, Ins. Div.):

HON. MAJOR-GENERAL COMMANDING THE DEPARTMENT:

In the matter referred to in accompanying communication anent the transfer of concession of the tramway between the capital and Rio Piedras, I have the honor to inform you that the central station of said tramway and a portion of its track as far as the San Antonio channel or creek, as also that lying in the neighborhood of Martin Peña channel, are built, according to my information, upon Government grounds, most of which correspond to those of the old "military zone."

Through a gratuitous concession of the preceding government, the grantee of the tramway was permitted to build the station and track upon said grounds, but without transferring the title and possession thereof, same being reserved by the Government. All these lots are very valuable, and were appraised at a high price under the previous régime.

I must also call your attention to the fact that another portion of the track is laid over lots belonging to residents of Santurce, who permitted the grantee to lay his track without giving up their title to the lands.

Upon your approval of the transfer, as requested, it should be accompanied with a clause to the effect that said approval is given without detriment or impairment of the rights of ownership belonging to the United States over the military and public lands occupied by the station and tracks of the tramway.

Yours, respectfully,

JUAN HERNANDEZ LOPEZ.

Whether or not the restrictions of the Spanish law requiring the assent of the Government to transfers of franchises and similar property are to be now enforced in Porto Rico, or shall be considered as obsolete and superseded by the American doctrine, that the right of alienation is appurtenant to ownership, is an administrative question, to be determined by the Secretary of War as an administrative officer.

The recommendation of the secretary of justice, Señor Lopez, that the approval of the transfer "should be accompanied with a clause to the effect that said approval is given without detriment or impairment of the rights of ownership belonging to the United States over the military and public lands occupied by the station and tracks of the tramway," suggests a not improper precautionary measure to avoid possible misconception, but it is not essential to the preservation of the property rights of the United States in and to the land the proprietary rights of which were held by the Crown of Spain and passed therefrom to the United States. Upon the acquisition of title by the United States, the property rights therein could only be alienated by Congress or by an officer of the Government authorized by Congress to make such alienation. In his opinion on the application of Weeks

et al. for permission to construct a wharf at Ponce, Porto Rico, the honorable the Attorney-General, says (letter July 26, 1899):

I do not know of any right or power which the Secretary of War or the President has to alienate in perpetuity any of the public domain of the United States, except in accordance with acts of Congress duly passed with reference thereto. There is no legislation by Congress made for or properly applicable to the public domain in Porto Rico. The power to dispose permanently of the public lands and public property in Porto Rico rests in Congress, and, in the absence of a statute conferring such power, can not be exercised by the executive department of the Government. (22 Op. 545.)

#### PRIVILEGES DESIRED UPON COMPLETION OF TRANSFER.

The American investors, after acquiring, as they understood, the rights conferred by the concession for said tramway, organized a corporation under the laws of New York, to be known as the San Juan Light and Transit Company, which said corporation was to take over said concession and operate said tramway, using electricity as a motive power and also to distribute and sell electricity for light and other commercial purposes in San Juan.

To accomplish these purposes application is made on behalf of the San Juan and Rio Piedras Tramway for the following privileges:

1. To change the motive power of the tramway to electricity.
2. To change the gauge of the road.
3. To extend said road through and upon certain streets of San Juan for a distance of about 1,500 feet, so as to form a loop.
4. To construct, maintain, and operate a branch line or spur on a portion of the property of the United States constituting the harbor front in San Juan.
5. To construct, maintain, and operate a branch line or spur, about 1,000 meters long, to reach a certain coconut grove on the beach near San Juan and frequented as a pleasure resort.
6. To purchase or lease from the United States 1 acre of ground, situate near San Antonio Bridge, upon which to erect an electric light and power plant.
7. In case a site for said proposed power house can not be secured from the United States, permission is sought to construct, maintain, and operate a branch line in Santurce to reach a site for the proposed power house in that locality.

The application contains requests for certain other privileges, but the requests are not pressed and are considered as abandoned. Since they are referred to and reported on in the documents herein, it may be well to avoid possible confusion by stating that said requests are as follows:

8. To extend the railroad from Rio Piedras to Caguas.
9. To extend the railroad from Rio Piedras to Carolinas.
10. To build a new line connecting Carolinas and Caguas.



Application is made on behalf of the San Juan Light and Transit Company:

1. To install and operate an electric system in San Juan and its suburbs for the production, distribution, and sale of electricity for light and power.

Technically these applications are separate and distinct; but as they are presented by the same parties and relate to one general object, the proceedings thereon have been conducted as one case, the necessary distinctions being easily preserved. The applications were referred to General Davis, who made a careful and exhaustive report thereon, to which the attention of the Secretary of War is respectfully invited. (See Doc. No. 32.)

In said report General Davis recommends favorable action as to the following (Doc. 32, p. 7, Ins. Div.):

1. The installation of a loop track through certain streets in San Juan, so that the railroad may reach the center of the city.

2. The change of the motive power of the road and widening of its gauge. The present locomotives are noisy and maladorous, and can not be permitted in the city proper. The present track has a gauge of but 29 inches, too narrow to permit a good development.

3. The installation of an electric plant would permit electric lighting of the city and its suburbs. The city streets are now lighted by gas and Santurce by kerosene lamps. The local electric-lighting company has entirely inadequate capacity for supply of existing demands, and its charges are exorbitant—\$2 and \$1.50, Porto Rican currency, for lamp (16-candlepower) per month, and only until 12 o'clock.

4. The only sites for a new electric-power plant that seem to be available are one on Government land near San Antonio bridge and the other a private lot in Santurce, which Mr. Wilson asks authority to connect by a spur track with his main line in case he is denied the use of Government land, as asked and as was approved by General Henry, as above stated. The permission to cross the Government road to the site for power house in Santurce and to erect a power plant for operating the road, and for general commercial purposes, is recommended.

Such of these requests as at the time had been made were referred to General Brooke while in command of the Department of Porto Rico, who reported thereon as follows:

\* \* \* The tramway is a public necessity, and the improvements contemplated should be made at once, but the Government should, in my opinion, if it grants them, make the condition that it in no way gives the tramway any privilege beyond what is provided in the original concession. \* \* \* (See third indorsement, Doc. 21.)

As constructed and now existing, the tramway starts at the square of Puerto de España, where the ferry crosses the harbor of San Juan and other boats land, and at a point about 500 yards from the business center of the city. Thence, passing the square of Columbus, the line traverses the length of the island of San Juan, a distance of about  $2\frac{1}{4}$  miles. It then crosses the San Antonio lagoon and traverses a private right of way for about 200 yards, and then occupies a portion of

the military road to a point near Rio Piedras, where it leaves the military road and occupies a right of way over private property to Rio Piedras.

The tramway occupies the western portion of the military highway and is constructed on a different grade from the wagon road and separated therefrom by an embankment. The houses on the other side of the highway are constructed on the curb line. Therefore there is not room for a competing parallel line occupying said military highway, if any such be in contemplation.

The tramway is of narrow gauge, but the ties are of sufficient length to permit the construction thereon of a standard-gauge line. The motive power in use is steam, and the rolling stock consists of 7 Baldwin locomotives, 17 passenger cars, and 21 freight and baggage cars.

The company has constructed four stations along its line, and owns shops, yard, and car barn at Rio Piedras.

#### THE CHANGE OF MOTIVE POWER.

The royal order granting the concession authorized Ubarri "to build a tramway," and was silent as to the motive power to be used. The royal order required that he "conforms strictly with the project approved" for said tramway. (Doc. No. 54.)

The approved project contained the following provision (Doc. No. 55, Ins. Div.):

5. If the steam power, which it is thought of using in the running of the tramway either on the Garretera or running over the streets of the villages, and which is granted by way of trial, should not give satisfactory results, and the engines should cause the slightest inconvenience in the opinion of the engineers, who are to be present at the experiments, to the people and teams passing over the public way, the concessionaire shall employ animal force to operate the tramway without any kind of claim being allowed him for this change of power.

It appears evident from this provision that the use of steam was not made a condition subsequent upon which depended the continuance of the concession. Experimental in the first instance, its continued use was considered as permitted as a favor, not enjoined as a requirement. The plain purpose of the provision is to require the concessionaire to consider his rights as subservient to those of the general public in operating said road, and to secure the use of a motive power which would not "cause the slightest inconvenience."

There might be a question of the right of the provisional government of Porto Rico under this clause of the concession to compel the company to use electricity, but may it not permit it to do so if the use does not encroach upon the rights of individuals and the general public?

The streets through which this tramway passes are so narrow that the placing therein of poles on which to stretch trolley and other dis-

tributing wires would probably interfere with the free use thereof by the public. This is recognized by the tramway company, and the privilege of setting up poles along the entire route is not asked. The company propose to stretch the wires by attaching them to the buildings along the right of way wherever possible. The company also recognizes that its concession does not privilege it to exercise the right of eminent domain, and that the right to attach the wires to said buildings must be secured from the owners thereof, and the application does not seek to secure from the Secretary of War the authority to exercise the right of eminent domain in this regard.

It is not necessary for the Secretary of War to grant the company the privilege of setting poles along the military highway. The tramway company erected poles for a telephone line along the right of way already occupied by the road. This was done under a concession for a telephone line from the Spanish Government. The poles are still standing and the telephone line in operation. The poles in present use are too small to sustain both trolley wires and telephone wires, but the intention of the company is to replace them with poles of larger size.

In the event that the Secretary of War shall deem it advisable to permit the use of electricity as a motive power on this tramway, as now constructed, it might be well to avoid a misconception of the authority granted by a provision specifically denying the right to place poles in the streets or military highway now occupied, except in such places as may be designated by the military commander of the department, or to attach wires to private property without the consent of the owner.

If I properly understand the application, its extent and intent in this regard, it is to secure permission to stretch wires along its right of way at such height as may be prescribed for the purpose of utilizing electricity as a motive power. To illustrate: If the company contemplated moving its cars by storage batteries without the necessity of wires to distribute and deliver the power and requested the permission of the Secretary of War so to do, the question would be one of regulating an existing right, to wit, the right to operate the tramway. If a trolley wire is stretched along and over the right of way already secured and occupied, at such height as to prevent injury or obstruction to the public, and held in place by supporting wires attached to private property, with the consent of the owners, is it not still a regulation of an *existing* right rather than a grant of *new* right? A liberal interpretation of the rights of the concessionaires would justify such holding, and the interpretation of the concession is to be determined by the Secretary of War.

## THE CHANGE OF THE GAUGE OF THE TRAMWAY.

The distance between the rails as now standing is  $29\frac{1}{2}$  inches. The company seeks the permission of the Secretary of War to extend this distance to 40 inches. The gauge of the tramway is not fixed by the royal order granting the concession or the approved project of the tramway. It seems to have been constructed at a narrow gauge because the owner of the concession desired so to do. The right to obstruct the streets and the military highway where the road is now built, by maintaining the tracks thereon, was granted by the original concession. The application seeks the exercise of that right in a certain way. As already stated, the ties on which the rails now rest are long enough to admit of the rails being placed at standard gauge. It does not appear to the writer that the obstruction would be increased if the space between the rails of the existing track was widened. The serious obstruction to the traffic of the streets by this tramway is occasioned by the passage of the cars along said track, and is measured by the width of the car rather than the width of the track. In response to inquiries made at the hearing had on this application the representatives of the company stated that the width of the cars now in use on said tramway varied from  $6\frac{1}{2}$  feet to  $7\frac{1}{2}$  feet. That it was the intention of the company to equip the cars now in use with new trucks of standard gauge and continue their use, and that new cars would be  $7\frac{1}{2}$  feet in width, which, they stated, was the width of ordinary street cars.

The question of the gauge at which the track of this tramway is to be maintained seems to be one to be determined by the Secretary of War exercising the power of regulating an existing right rather than the creation of a new one.

In this connection attention is directed to the claim of the company that on October 15, 1898, the requisite authority to change the motive power and the gauge of the track was granted by the Spanish authorities in Porto Rico. In regard thereto General Davis in his report says:

There seems to be no doubt that a few days before relinquishment of sovereignty by Spain a Spanish official, whether duly empowered or not unknown, gave permission to Mr. Ubarri to substitute electricity for steam power and to widen the gauge of the track. The permit, however, is coupled with the conditions that detailed plans of the changes shall be submitted for approval. (Doc. 32, p. 5, Ins. Div.).

If the proposed changes in the motive power and the gauge of the road are considered as regulations for the exercise of existing rights, the alleged action of the Spanish authorities is immaterial, such regulations being, of necessity, subject to the approval of the military authorities now in charge of the provisional government of Porto Rico.

If said proposed changes are considered as being property, they become liable to the tests applicable in other cases of transfer of public property. In regard thereto Halleck says:

The proper test is the purpose of the grant, i. e., the *fides* of the parties. (See Halleck's Int. Law, 3d ed., vol. 2, chap. 33, sections 23, 24, and 25.)

The United States Supreme Court say:

Grants of soil made *flagrante bello* by the party who fails, can only derive validity from treaty stipulations. (*Harcourt v. Gaillard*, 12 Wheat., 523, 528.)

No attempt has been made in these proceedings to establish the *bona fides* of the authorization attempted by the Spanish officials. If the Secretary of War shall consider such showing necessary, the matter should be again forwarded to General Davis for investigation and report, and the applicants so informed.

The showing at present consists of a statement in the application herein that such permission was secured and "is set forth in a communication from the office of the Secretary of *Fomento*, and signed by the subsecretary thereof, an English translation of which is as follows:

No. 366.

As a reply to your favor of the 30th of September last, soliciting authorization to change the present system of steam locomotion for electricity on the tramway of which you are concessionaire, and to widen the road 1 meter and 44 centimeters, the secretary of the cabinet has granted your request, but you must present at the office of the secretary a detailed statement of the changes, which must be approved before they can be carried out. \* \* \*

At Porto Rico, the 15th day of October, 1898.

CARLISTO ROMERO,  
*The Under Secretary, P. R.*

(See Doc. 39, p. 2, Ins. Div.)

#### THE EXTENSION OF THE TRAMWAY ON CERTAIN STREETS IN SAN JUAN FOR A DISTANCE OF ABOUT 1,500 FEET, SO AS TO FORM A LOOP.

This privilege is greatly desired by the company and urgently insisted upon. The claim is made that if electricity is used as a motive power the loop is necessary for the best and most efficient operation of the tramway, although not indispensable for a service of medium efficiency. That such extension would be a convenience to the public, promote the general interests of the city, and greatly benefit the company is undoubtedly true. In reporting favorably on this proposal, General Davis says (Doc. 32, p. 12):

While it will be valuable to the road, it will also be of greater value to the city.  
\* \* \*

The width of the streets in which it is proposed to build the loop varies from 4.62 meters to 6.90 meters from curb to curb. (Oral statement by manager of company.)

If permission to construct and operate this extension is a franchise originating with the sovereignty of the United States and conferred upon the beneficiary by an officer of the executive department of the United States Government, it would seem to be inimical to the administrative policy heretofore announced by the Secretary of War, that franchises in Porto Rico would not be granted at the present time.

“A franchise” as used in this connection is understood by the writer to mean—

A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right. (Ang. and A. on Corp., par. 4.)

Regarding their creation Thompson says:

Our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage. (4 Thomp. Corp., par. 5335.)

There is another theory and another inhibition to be considered. The theory is that the municipalities of Porto Rico while under Spanish sovereignty possessed the fee title to such of their streets as were constructed and maintained with municipal funds; that the municipalities also possessed the right to determine how such streets should be used; that usage of such streets for specific purposes might be authorized by the municipalities by permission, requirement, or complete alienation, and that such right did not cease upon the cession of sovereignty.

The inhibition is that contained in the Executive order (issued as General Order, No. 188, series of 1898), as follows:

EXECUTIVE MANSION, *Washington, December 22, 1898.*

Until otherwise ordered, no grants or concessions of public or corporate rights or franchises for the construction of public or quasi public works, such as railroads, tramways, telegraph and telephone lines, waterworks, gas works, electric-light lines, etc., shall be made by any municipal or other local governmental authority or body in Porto Rico, except upon the approval of the major-general commanding the military forces of the United States in Porto Rico, who shall, before approving any such grant or concession, be so especially authorized by the Secretary of War.

WILLIAM MCKINLEY.

The applicants herein have undertaken to secure the privilege under consideration in conformity with said order, and to this end presented an application to the municipal authorities of San Juan for permission to make said extension and requested said authorities to take favorable action thereon, and said application then to be submitted to the military authorities in compliance with said General Order, No. 188. (Doc. 48, Ins. Div.)

The municipal council acted upon said application by adopting the following:

The municipal corporation recognizes the project of the electric railroad as useful and beneficial to the city, and as such recommends it to the Government at Washington, this declaration not involving the privilege of considering it as work of public utility as regarded by the Spanish law still in force in the island, leaving also as a consequence the interest of the third party. (Doc. 48.)

The application of the company, with a statement of the action of the municipal council attached, was forwarded to the major-general

commanding, who recorded his action thereon by the following indorsement: "App'd. Guy V. Henry, Major-Gen'l Vols., Com'g." (Doc. 48.)

The company now presents the application and said proceedings thereon to this Department, with a request that said grant or concession be authorized by the Secretary of War.

A strict interpretation of General Order, No. 188, would probably require that the authorization of the Secretary of War is a condition precedent to action by the major-general commanding, whose approval is a condition precedent to the grant of a concession by the municipal authorities. (G. O. 188, series 1898.) However, if the Secretary of War shall see fit to ratify the action heretofore taken herein, the irregularity would be cured.

If the Secretary of War shall decide to allow the extension of the tramway to form said loop, it will be proper for him to determine which of his powers he will exercise and the extent of the grant or permission. That is to say, whether he will exercise his power as the representative of the sovereignty of the United States, and by such exercise create a complete grant, confirming vested rights, or exercise the "police power" which he possesses as the head of the provisional government of Porto Rico, by virtue of which and other powers of said government lodged in him he is authorized to regulate and control such public matters as the use of streets and other things relating to the public convenience, health, and welfare. If so granted, the permission will be a regulation of the use of certain streets, and may be limited "until otherwise ordered," or by the duration of the military government in said island, or by such definite terms and conditions as shall seem advisable to the Secretary of War.

It may be well to direct attention that the permission to be secured by the exercise of what is termed herein the "police power" is not what is known as a "revocable license," although the authority conferred is somewhat similar. A revocable license relates to property owned by the United States—property in which the United States possesses the proprietary rights as well as the sovereign rights. The authority to grant a revocable license as to such property is conferred upon the Secretary of War by act of Congress approved July 28, 1892. (27 Stat. L., chap. 316, p. 321; see Supp. U. S. Rev. Stats., vol. 2, p. 56.)

If the fee to a street in a city in Porto Rico was in the municipality under Spanish dominion and such property right was not destroyed by the cession of sovereignty, it is submitted that the property rights of the municipality are to be respected equally with those of an individual. (*Cohas v. Raisin*, 3 Cal., 443; *Hart v. Burnett*, 15 Id., 530; *Payne and Dewey v. Treadwell*, 16 Id., 221; *White v. Moses*, 21 Id., 34; *Merryman v. Bourne*, 9 Wall., 592; *Moore v. Steinbach*, 127 U. S., 70, 81.)

If the fee to the ground occupied by the streets over which the proposed extension is to pass is in the United States, the Secretary of War may grant the permission by revocable license. (Op. Atty. Gen. on Weeks's App. letter to Sec. of War, July 26, 1899. See action of Secretary of War on App. of New York and Porto Rico Steamship Co. for license to build wharf in harbor waters at San Juan, P. R.; action on App. of Gaskell et al. to build wharf in harbor waters at Ponce, P. R.; action on App. of Valdez for license to construct dam at Comeiro Falls, P. R.)

The proceedings herein do not disclose who owns the fee of the streets involved. If the Secretary of War is of the opinion that his decision turns upon this point, inquiry should be made of General Davis as to who owns the fee of the ground occupied by the streets in which it is proposed to build the loop extension of the San Juan and Rio Piedras Tramway.

This question of fact becomes important also in the consideration by the Secretary of War of the question of authorizing the municipal authorities of San Juan to grant the desired permission. If said ground occupied by said streets is the property of the United States, the municipal authorities of San Juan can not grant rights in and to said property without the authority of the United States so to do. (Moore v. Steinbach, 127 U. S., 70, 81.)

Stated directly, the propositions are—

(a) If the municipality of San Juan owns the fee of the streets involved, the right to grant the permission belongs to the municipality, but can be exercised only when especially authorized by the Secretary of War.

(b) If the fee belongs to the United States, the Secretary of War is empowered to issue a revocable license granting the desired permission.

(c) If the fee belongs to the United States, the action of the municipality is immaterial except as a means of informing the Secretary of War of the views of the officials taking said action.

If the Secretary of War shall ratify and approve the action heretofore taken by the municipal authorities hereon, the further procedure is to be determined by him in accordance with the character of the rights conferred.

If the rights are merely those of permissive regulation for the use of the streets, to be exercised temporarily without vested rights attaching, it would not seem necessary for the Secretary of War to do more than to fix the terms and conditions upon which said permission was to be exercised.

If the Secretary of War shall determine that the municipality of San Juan has the right to grant the privileges desired and is to be permitted to exercise said right in this instance, and that, when granted, the right is a vested property right, and that he will ratify and approve the action heretofore taken by the municipal authorities to



that end, it then rests with the Secretary of War to say what, if any, further proceedings are to be had.

In dealing with the property belonging to the municipality the municipal officers do not exercise the rights of individual ownership thereover. They possess only such powers as have been delegated to them, and must ordinarily exercise them in a prescribed manner.

Regarding the powers of municipal government and their regulation and control in Cuba, the Attorney-General says (letter of July 10, 1899, opinion on "Dady contract"):

Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the proper authorities of the United States may change or modify either the form or the constituents of the municipal establishments; may, in place of the system and regulations that formerly prevailed, substitute new and different ones. Upon this line the same authorities, exercising sovereignty over the island, have the power to provide the methods, terms, and conditions under which municipal improvements, which relate entirely to property belonging to the municipality or held by it for public use, may be carried on. The old provisions of the Spanish law may be adopted, so far as applicable, or they may be entirely dispensed with and a new system set up in their place. The municipal authorities of Habana, in the matter of engaging in the construction of public works, may be permitted to proceed under such law as is now applicable, if that be adequate, or they may, at the will of the military commander, be restrained from engaging in any such works or from permitting any such works to be carried on, although inchoate or even completed contracts therefor have previously been entered into. (22 Op., 528.)

This opinion applies with equal force to Porto Rico.

This concession differs from those ordinarily granted by Spain in that the tramway and the vehicles operated thereon are considered as being ordinary conveyances, like a cart, stage, or automobile, and entitled to similar rights of passage on the public highways and subject to similar limitations. The royal order granting the concession declares:

22. The tramway being considered a mere vehicle running through the public highways, the concessionnaire is obliged to observe the regulation of police which may be imposed on all other vehicles to make use of the road, San Antonio Bridge, and town crossings. (Doc. 54, Ins. Div.)

By other provisions in the concession, the operation of the tramway is subject to such regulations for the operation of railroads in said island as are not in conflict with the decree of concession. (Id., Spec. 19.)

Being considered as operating an ordinary vehicle, and not a work of public utility, the tramway company was not empowered to exercise the rights of eminent domain in the sense of acquiring property without the assent of the owner, and was not exempt from taxation. (Doc. 54; also Report of Gen. Davis, Doc. 32; Report of Sec. of Justice, Dept. Porto Rico, Dec. 3, 1896; Doc. 24.)

“Being considered a mere vehicle running through the public highways,” the *termini* of the tramway are not fixed by the concession.

As stated in the royal order, the concession is “for the construction, as per approved project, of a single-track tramway between the capital and the town of Rio Piedras.” (Doc. 54, Spec. 1.)

The approved project does not specify definite terminals. It designates the road as a “tramway between the capital and the village of Rio Piedras.” (Spec. 1.)

The approved project further provides as follows:

Third. The works shall be performed under the superintendence of the chief engineer of the province, who shall determine the proper site for the switches of the stopping stations, and shall decide also all that which tends to duly guarantee the public interests. \* \* \*

Fifth. The concessionnaire shall not proceed to the building of the stations and platforms, and crossing of roads, water courses, or of any other kind of works, no matter how much they may be considered essential to the line in other points of public domain of the State, than those granted for the purpose, without having obtained the authorization which is given for it. \* \* \*

Nineteenth. The concession of this tramway, *so far as it affects the public domain by the occupation* to which the first condition of this instrument refers, is declared to be for the period of sixty years, subject to the provisions of said paragraph 1, and to the terms of the decree law of the 14th of November, 1858, to the law of the 5th of June, 1859, modified by the law of the 15th of June, 1864, and to the rules and general regulations for railroads, in so far as it is not opposed to the clauses and principles of the decree law before cited, the rules which the inspection department may to that end dictate to him being also observed by the concessionnaire in the execution of the work.

Without stopping to investigate the right of the tramway concessionnaire under Spanish dominion to extend the road over the streets of San Juan, further than to determine that such rights, if possessed, could only be exercised by and with the approval of the Crown officers, it seems apparent from the provisions of the specifications above quoted that the right, if it existed, did not attach to specific territory until the road was definitely located or constructed thereon. Until such time the right was inchoate, *sub judice*. As to such right the Attorney-General says: (22 Op. 549.)

If in the granting of a right or privilege the sovereign has retained an iota of authority which may affect its untrammelled exercise and enjoyment, the right is not of the nature of an absolute one, but wholly of an inchoate and imperfect quality. As to inchoate, imperfect, incomplete, and equitable rights, the succeeding sovereign is the absolute dictator. They can not be exercised against his sovereignty, but only by his grace, and his affirmative exercise is necessary to the validity of the concession. (Op. Atty. Gen. on App. of Valdez to use Water Power of the River Plata, P. R.; letter to Sec. of War, July 27, 1899.)

While the company proposes to support its trolley on the proposed loop extension by brackets attached to buildings along the line of the extension where such course is feasible, attention is directed to the fact that at certain places on the proposed line there are no buildings

on one or both sides of the street and at such points it would be necessary to erect poles.

For a better understanding of this matter attention is directed to a map of the city of San Juan, filed herein as Document No. 35, Insular Division. The solid red line on said map shows the proposed route of the loop extension. Commencing at the point where the red line joins the black line, which indicates the tramway as now constructed, and following the red line as it proceeds westward, there is reached a junction of the solid red line and a broken red line. The solid red line indicates the route proposed by the company; the broken red line indicates a change in said line, as suggested by General Davis. The route indicated by the broken red line passes over an open field on which there are no structures. Certain portions of it are marked as parks, but they are parks in the sense only of being reserved for that purpose. The solid red line parallels the military highway, but does not encroach thereon, and along the route indicated by the solid red line there are also no structures. From the point where the proposed route leaves the line as constructed until it crosses the street known as "Calle de O'Donnell" there are no structures to which brackets could be attached, and in order to operate the road by electricity it would be necessary to erect poles to sustain the trolley wire. After the route crosses San Francisco street there are buildings on both sides, and poles would not have to be erected until the road crossed the street known as "Calle de la Cruz." From this point on there are buildings on the north side of said street, but none on the south side of the street, which is a park known as "Plaza de Alfonso XII." It would be necessary to erect poles along the south side of the street for the length of the park when the extension reaches the street known as "Calle de José." On this street the extension turns south and the buildings could be utilized until the extension reached the street known as "Calle de Tetuan." From that point on the proposed route traverses a portion of the city in which no buildings are constructed, and the abutting land is owned by the United States. General Davis suggests that, if the Secretary of War permits the construction of the proposed extension, the company be granted the privilege of erecting poles throughout the line of said extension at such places as may be designated by the municipal authorities and approved by the commander of the military department.

This object could also be accomplished by having the company state definitely and specifically the places on the property owned by the United States at which they desire to erect poles and the Secretary of War issue a revocable license permitting them so to do, and the question of erecting poles in the municipal streets be referred to the municipal authorities and the commander of the military department.

In his report thereon General Davis calls attention to the fact that the city of San Juan greatly needs revenues, and recommends that

this valuable privilege be made to yield an income to the city by requiring the company to pay 2 cents for each paying passenger around said loop. (Doc. 32, p. 9, Ins. Div.)

In view of the uncertainty and inconvenience which would probably result from this plan it might be well to fix a definite sum, to be paid at stated intervals, if the privilege is granted, making the payment a condition of the enjoyment of the privilege.

THE CONSTRUCTION AND OPERATION OF SPUR ON THE HARBOR FRONT  
AT SAN JUAN.

The harbor front at San Juan is property of the United States, proprietary rights having been acquired from the Crown of Spain. The Secretary of War may therefore issue a revocable license authorizing the construction and operation of a tramway thereon upon such terms and conditions as he sees fit.

General Davis reports in regard to this desired privilege that no present necessity exists for the installation of a tramway on the harbor front. (Doc. 32, p. 7.)

THE CONSTRUCTION AND OPERATION OF A BRANCH LINE REACHING TO  
A COCOANUT GROVE ON THE BEACH NEAR SAN JUAN, FREQUENTED  
AS A PLEASURE RESORT.

The attention of the Secretary is directed to the smaller of the two blue prints attached to Document No. 48 for information regarding the location of the grove and the extent of the privilege sought for by this part of the application. The company propose to secure, by purchase or otherwise, a right of way over the private property lying between the tramway, as now constructed, and said grove, but the tramway lies on the side of the military road farthest from the grove, and in order to reach the grove it is necessary for the company to lay a track across the military road. This is the privilege which is requested. The military road being property of the United States, the Secretary of War is authorized to grant such permission by way of revocable license.

It will be noticed that this branch passes through what appears to be a portion of the village of Santurce, lying on the northeast side of the military road. In conversation with General Davis he stated to the writer that the village of Santurce was a straggling hamlet without defined streets, and that this branch would in no way interfere with the passage of the public.

TO PURCHASE OR LEASE FROM THE UNITED STATES A LOCATION FOR  
AN ELECTRIC PLANT.

Attention has been directed hereinbefore to the holding of the Attorney-General that the Secretary of War can not sell property of the United States situated in Porto Rico, but that he may lease such property by granting a revocable license.

General Davis reports favorably on the application for a lease of such site, and if there are no military or other reasons against permitting the erection of a building on the location desired, it might be an additional means of revenue for the provisional government. From the statements made by the representatives of the tramway company at the oral hearing, and also the statements made by the representatives of the company to General Davis and by him communicated to the writer, it appears that in the event that the Secretary of War shall grant the request of the company to cross the military road, and thereby enable it to build an extension to the cocoanut grove, it will be unnecessary for the company to secure a site for its electric plant on Government property, as the company can secure a good location for said building along the line of the proposed road to the grove. This is what is contemplated in the request of the company numbered seven in this report, and therefore said request number seven needs no further explanation.

#### APPLICATION OF SAN JUAN LIGHT AND TRANSIT COMPANY.

There remains to be considered the application of the San Juan Light and Transit Company for permission to install a system of electric lighting in the city of San Juan. The San Juan Light and Transit Company is an American corporation, organized under the laws of the State of New York. The articles of incorporation were filed May 13, 1899. The company does not claim to have acquired any rights from the Spanish Government. It is an application for a new and original franchise.

The company have applied to the municipal authorities of the city of San Juan for the desired privilege, and said municipal authorities have consented to the grant of said privilege, subject to the approval of the general in command of the department and the Secretary of War. The questions thus presented have been discussed in connection with the privilege of extending the loop, and therefore need not be repeated.

General Davis reports favorably in regard to granting this franchise.

Attention is directed to the fact that on account of the streets in San Juan being narrow, the erection therein of electric-light poles would be a serious obstruction, and should be obviated wherever possible. The representatives of the company recognize this and say that for the purposes of distributing the light they could attach their wires to the buildings, and that they propose to secure the right so to do from the owners of the buildings. They understand that they can not secure the privilege of exercising the right of eminent domain from the Secretary of War, and do not request such privilege.

The attention of the Secretary of War is also directed to the fact that an electric-lighting system is already installed in the city of San Juan under a concession from the Spanish Crown. If the Secretary

of War shall deem it advisable to authorize the San Juan Light and Transit Company to install another system, an examination should be made of the concession owned by the present company, in order that their property rights may not be impaired, such rights being protected by the treaty of Paris (1898). No information regarding the terms of the existing concession is available in this Department.

It will be observed that most of the questions presented by the applications involved herein are administrative, and therefore do not call for recommendation. Such questions as are not administrative are alternative. It is therefore impossible for me to prepare the form of an order in regard thereto until advised by the Secretary of War as to his determination.

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The foregoing report was referred to the military governor of Porto Rico for his consideration in carrying out the direction of the Secretary of War, as follows:

WAR DEPARTMENT,  
Washington, D. C., April 5, 1900.

You are hereby authorized to approve, with or without conditions, the proceedings of the municipal council of San Juan, P. R., heretofore taken or to be taken in the matter of the application of the owners of the San Juan and Rio Piedras Tramway Company to extend its tramway and to change the motive power and gauge thereof.

The authority hereby conferred is to be exercised in accordance with the treaty of peace between the United States and Spain, and the laws, ordinances, and military orders now in force or hereafter established in Porto Rico.

ELIHU ROOT, *Secretary of War.*

Brig. Gen. GEO. W. DAVIS,  
*Military Governor of Porto Rico, San Juan, P. R.*

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**IN RE THE MATTER OF ANNULING THE ALLEGED TITLE TO  
THE ISLAND OF CAJA DE MUERTOS AND THE PHOSPHATE  
DEPOSITS THEREIN, GRANTED BY GENERAL HENRY TO  
MIGUEL PORRATA DORIA IN 1899.**

[Submitted May 22, 1900. Case No. 842, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of the papers in the above matter with a request for a report thereon, and in compliance with said request I have the further honor to report as follows:

In two letters, the first dated April 17, 1900, and the second May 4, 1900, Brigadier-General Davis directs the attention of the Secretary of War to the grant made by General Henry to Miguel Porrata Doria for the island of Caja de Muertos, under which Doria claims to exercise ownership over the phosphate deposits in said island, and urges that steps be taken to cancel and annul said grant.

It appears from the papers that since 1893 a controversy has existed between several parties who were desirous of securing from the Spanish Government a concession to remove the phosphates on this island. Doria was one of the contestants. At one time the concession was ordered to be sold at auction, and, the sale being had, the concession was awarded to a man named Collado. Subsequently, at the instance of Doria, the grant to Collado was annulled. Thereupon Doria insisted that the grant should be made to him by virtue of his original proceedings. This application had not been acted upon at the time the island of Porto Rico became subject to military occupation by the forces of the United States. On November 4, 1898, Doria addressed a communication to General Brooke reciting the previous steps which he had taken, and requesting that a grant of the desired privileges be made to him in virtue of such proceedings. In his communication to General Brooke, Doria says:

After all the necessary steps had been taken and the only thing remaining to be done was to grant the final concession of this isle to the petitioner, \* \* \* from which it would seem that he does not claim that he acquired absolute rights to the property from the Spanish Government; that there yet remained the final act on the part of the Spanish authorities conveying said right to him.

Under the rule announced by the Attorney-General in the case of Ramon Valdez (with which opinion the Secretary of War is entirely familiar), Doria does not possess concessionary rights which the provisional government of Porto Rico is authorized to recognize. (22 Op. 546.)

It appears that during the pendency of the controversy Doria was given provisional authority, pending final decision in the matter, to remove the phosphates in this island upon payment of an annual rental and a royalty on each ton of phosphate exported. The exercise of this privilege was limited to the time occupied in determining who should receive the continuing concession under the proceedings then instituted. Therefore, by the terms of the grant, the right to enjoy the privilege ceased when the concession was conferred upon Collado. Subsequently the concession to Collado was set aside; but, as a legal proposition, I do not think this would revive the provisional grant to Doria in the absence of affirmative action in regard thereto by the Spanish authorities. Whether it did or not is now immaterial, for, at best, Doria was but a tenant at will of the Spanish Government and admonished from the inception of his tenantry of its temporary character. When the Spanish Government ceased to be the proprietor of the property and the United States became the owner thereof, Doria would certainly be no more favorably conditioned.

General Brooke did not see fit to finally determine the claim made by Doria, and the matter was presented to General Henry, who sus-

tained the claims of Doria, giving him provisional authority to remove the phosphates upon the payment of a yearly rental of 100 pesos and 25 cents per ton on each ton exported. Subsequently a deed of ownership was "approved" by General Henry, granting a concession of the island to Doria for the purpose of utilizing the phosphate deposits existing in said isle in accordance with the Spanish mining laws, upon the condition that he pay for the land and its products such excise or tax as the law on the subject may establish.

It is this deed or concession which General Davis now urges should be annulled.

I have heretofore submitted a report on the general questions involved herein, to which the attention of the Secretary of War is directed. (See report "In re Mining Claims and Appurtenant Privileges in Cuba, Porto Rico, and Philippine Islands," dated May 19, 1900.)

In his letter to the Secretary of War, dated May 4, 1900, General Davis states that he has consulted with Governor Allen and that both he and the Governor are in doubt as to who has jurisdiction to annul said grant.

Under the rule announced by the Attorney-General in the Valdez matter, and in his opinion on the application of Weeks to construct a wharf on Government property in Porto Rico, there is no occasion for "annulling" the grant under consideration, for it was void when made by General Henry.

If this view is accepted the only question is, Who has the authority to prevent the spoliation of property owned by the United States in Porto Rico—the civil governor or the military commander?

The law of Congress establishing a civil government in Porto Rico, approved April 12, 1900, provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to the island of Porto Rico and to the adjacent islands and waters of the islands lying east of the seventy-fourth meridian of longitude west of Greenwich, which were ceded to the United States by the Government of Spain by treaty entered into on the tenth day of December, eighteen hundred and ninety-eight; and the name Porto Rico, as used in this act, shall be held to include not only the island of that name, but all the adjacent islands, as aforesaid.*

Section 13 of said act is as follows:

SEC. 13. That all property which may have been acquired in Porto Rico by the United States, under the cession of Spain in said treaty of peace, in any public bridges, road houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines, or minerals under the surface of private lands, and all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor-works boards of Porto Rico, and all the harbor shores, docks, slips, and reclaimed lands, but not including harbor areas or navigable waters, is hereby placed under the control of the government established by this act to be administered for the benefit of the people of Porto Rico; and the legislative assembly hereby created shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable.



From this it seems clear to my mind that the duty of preventing unlawful appropriations of said public property devolves upon Governor Allen as the present head of the government of the island, and to enforce such protection he may lawfully call upon the military commander of the United States forces in the island to aid him in such endeavor.

If the views expressed are accepted by the Secretary, the proper procedure for the War Department is to return all the papers herein to General Davis, and advise him that the Secretary is of opinion that the commanding officer of the United States military forces in Porto Rico is now without authority, in the first instance, to exercise the powers of the United States in said matter, such authority and resulting duty having been conferred upon the civil governor by Congressional enactment.

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By direction of Hon. George D. Meiklejohn, Assistant Secretary of War, on June 4, 1900, the papers in the case were returned to the officer in command of the military forces of the United States in Porto Rico, indorsed as follows:

The Assistant Secretary of War is of the opinion that the commanding officer of the United States military forces in Porto Rico is now without authority, in the first instance, to exercise powers in the case, such authority and resulting duty having been conferred upon the civil governor by Congressional enactment.

You are, therefore, authorized to transmit these papers direct to the governor of Porto Rico.

A copy of the opinion, as rendered by the law officer of the Customs and Insular Division, in which the Department concurs, is forwarded herewith, as it may afford information in the consideration of the case.

By order of the Secretary of War.

CLARENCE R. EDWARDS,  
*Acting Assistant Adjutant-General.*

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**IN RE CONTRACT WITH WOOLF ET AL. REGARDING THE MANUFACTURE AND USE OF ELECTROZONE FOR PUBLIC PURPOSES IN HABANA, CUBA.**

[Submitted December 31, 1900. Case No. 2086, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your request for a report on the above-entitled matter, and to respond thereto as follows:

This application is a request that the Secretary of War—

1. Assent to the action of the original contractors, who have sold and assigned a one-third interest in said contract to the Electrozone Commercial Company, New York.

2. Recognize said Electrozone Commercial Company as a party to the contract.

3. Permit said assignment to be recorded in such manner and place as will permit said assignee to receive directly from the United States Government one-third of the several payments under said contract as they shall become due and paid.

This application has been referred to the military governor of Cuba, who returns it without comment or recommendation. The military governor of Cuba referred the application to W. J. Barden, first lieutenant, Corps of Engineers, U. S. A., acting chief engineer, Division of Cuba, and subsequently the matter was referred to Maj. Edgar S. Dudley, judge-advocate, Division of Cuba. From their indorsements it appears that they entertain the view that said assignment is governed by the provisions of section 3737, United States Revised Statutes. (See third and fifth indorsements, Doc. 1.) The military authorities of Cuba apparently have no objection to favorable action on this application by the Secretary of War; at least no objection is made.

If the Federal Government of the United States is one of the parties in interest and bound by the contract involved, then the assignment is governed by said section 3737 without regard to the place of performance. If the military government of Cuba or the municipal government of Habana is the real party in interest and bound by said contract, then I see no reason why the action of the Secretary of War should be called for in the first instance. If the contract is with the government of civil affairs in Cuba, that character should be preserved. If the Secretary of War shall now recognize the contract as being with the Federal Government of the United States, complications may hereafter arise.

The contract provides for the purchase of certain "positive electrodes" and the right to use them in Habana, Cuba, in the manufacture of "electrozone" for public use of said city, and to pay a royalty on the electrozone so produced at the rate of one-twentieth of 1 cent per gallon for the first 50,000 gallons per day of twenty-four hours and one-fiftieth of 1 cent for each gallon in excess of 50,000 gallons per day.

"Electrozone" is made from sea water, and appears to be a fluid highly charged with chlorine. It is used by the authorities in Cuba to promote the sanitation of Habana. The contract under consideration recites:

This agreement, entered into this 10th day of February, 1899, between William Murray Black, lieutenant-colonel, chief engineer, U. S. V., Department of Habana, of the first part, and Albert Edward Woolf and Rosamond Woolf, \* \* \* both of New York City, \* \* \* of the second part, witnesseth, that William Murray Black, for and on behalf of the Department of Habana, and the said Albert Edward Woolf and Rosamond Woolf, do covenant and agree \* \* \*

The written instrument is signed as follows:

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

JOHN E. TUCKER, as to

WILLIAM MURRAY BLACK, [SEAL.]

*Lt. Col., Chf. Eng., U. S. V.*

HENRY N. HOOPER, Jr., as to

ALBERT E. WOOLF, [SEAL.]

H. H. MCGINTY, as to

ROSAMOND WOOLF,

By ALBERT E. WOOLF, [SEAL.]

*Attorney in fact.*

This instrument, so executed, was approved as follows:

Approved, February 11, 1899.

WILLIAM LUDLOW,  
*Governor of Habana.*

In determining the character of a contract, the subject-matter and the situation of the parties are to be fully considered with regard to the sense in which language is used.

At the time this contract was entered into (February 10, 1899) the city of Habana was subject to military occupation by the military forces of the United States. As a result of this occupation the administration of the civil government devolved upon the occupying force. This requirement included the administration of municipal affairs as well as the affairs of the General Government. The services required for such administration were to be performed by such persons as were designated therefor by the commander of the occupying force. Such commander designated William Ludlow, brigadier-general, U. S. V., as the head of the municipal government of Habana, and William M. Black, lieutenant-colonel, U. S. V., as chief engineer for said municipality. In the exercise of the powers thus acquired, and in the discharge of duties arising from the necessities of the municipality of which they were officials, this contract was entered into. The intention of the parties (which at all times is the pole-star of contract construction) was manifestly to render a service to the municipality. The service was of such character, being the sanitation of the principal seaport of the island and the promotion of the national commerce, that it was deemed just that the expense should be paid from the island funds. But the contract as entered into created an obligation resting upon the municipality. Therefore it required and received the approval of William Ludlow, governor of Habana, and did not seek nor secure the approval of the major-general in command of the forces of the United States in Cuba, who at that time performed the functions of military governor, nor the approval of the Secretary of War.

The fact that said contract was drawn upon a blank commonly used by the officers of the Engineer Corps, United States Army, or in

manner and form prescribed for the use of said officers, does not change the party to the obligation nor impose the obligation upon the United States.

If the contractual obligation rests upon the Habana municipality or upon the military government of Cuba, it follows that, although the Secretary of War may act in matters relating thereto, it is the established practice of the Secretary to refrain from such action as much as possible and to confine the administration of said governments to the local officials.

I therefore recommend:

1. That the Secretary of War decline to recognize this contract as one to which the Federal Government of the United States is a party.
2. That the application be returned to the military governor of Cuba, and he be advised that the Secretary of War is of opinion that said contract relates exclusively to the administration of certain affairs of the civil government of Cuba, and should be dealt with as such by the military governor.
3. That the applicant be advised of the action taken.

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By direction of the Secretary of War on January 10, 1901, the papers in this case were returned to the military governor of Cuba with the information—

That the Secretary of War declines to recognize this contract as one to which the Government of the United States is a party, and that he is of opinion that said contract relates exclusively to the administration of certain affairs of the civil government of Cuba and should be dealt with by the government of the island.

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**IN THE MATTER OF THE CLAIM OF ANTONIO ALVAREZ NAVA Y LOBO FOR THE SUM OF THIRTY THOUSAND DOLLARS DAMAGES FOR BEING DEPRIVED OF THE OFFICE OF NOTARY, HELD BY HIM IN SAN JUAN, PORTO RICÓ, UNDER THE SPANISH RÉGIME.**

[Submitted September 20, 1899. Case No. 853, Division of Insular Affairs, War Department.]

This is a claim for damages in the sum of \$30,000 asserted against the provisional government of Porto Rico.

The claimant asserts that his damages arose as follows (see "Memorandum" of claimant):

In 1896 the claimant, Antonio Alvarez Nava, was appointed notary in the city of San Juan. He claims that he paid 23,000 pesos to secure the property rights of said office, and incurred other expenses in connection therewith sufficient to make the total expenditure amount to 30,000 pesos. That in November, 1898, he was required by the supreme court of Porto Rico to renounce his Spanish nationality, and

upon refusing so to do he was deprived of his office as notary and his property rights therein, and one Santiago Palmer was appointed in his place.

When this claim was filed at headquarters, Department Porto Rico, it was referred to the secretary of justice. From his report thereon I quote the following:

On the 28th of October, 1898, \* \* \* the then secretary of justice proposed among other appointments of notary, that of Antonio Alvarez Nava, who held at the time an office of similar class in the capital. \* \* \* Mr. Alvarez Nava informed Major-General Brooke, on the 18th of November, that it being his intention to preserve his Spanish nationality, he was not in a position to accept the appointment of notary or to take the required oath. \* \* \* In view of that formal resignation, so unconditionally made, the government filled the position thus made vacant by the nonacceptance of Alvarez Nava, appointing Mr. Palmer thereto. (See "Translation of 4th indorsement.")

General Davis, Brigadier-General commanding, in his indorsement says:

Respectfully forwarded to the Secretary of War for decision. The brief herewith, marked "Record on file at department headquarters, etc., contains an abstract of the case. \* \* \*

By that record it appears that on October 28, 1898, the secretary of justice for the island recommended that said Antonio Alvarez Nava be appointed a notary, and the appointment was made. The next day his commission (Letter of College of Notaries) was issued.

On November 19, 1898, the secretary of justice forwarded to headquarters a letter of Mr. Nava saying he can not give up his nationality to become notary and declines the appointment.

In passing upon this claim, the statement made by the secretary of justice for Porto Rico and that contained in the memorandum referred to by General Davis is relied upon as being correct. The facts as therein set forth present a proper case for the application of the legal maxim *Volenti non fit injuria*—he who consents can not receive an injury.

There is another reason why this claim should be rejected. On October 28, 1898, the date when the claimant alleges he was deprived of his office, the condition of war existed in Porto Rico. The protocol of August 12 suspended hostilities but did not end the war. The United States, in the exercise of its rights as a belligerent, had instituted military government in the island. That government was intended (1) to promote the military measures of the United States in the war, and (2) to maintain peace and order in the territory subject to military occupation by the forces of the United States.

So long as the condition of war prevailed and said government continued to be an instrument of war, the United States could exercise, in territory so occupied, the rights and powers of a belligerent. While it is true that the inhabitants of territory under military occu-

pation are usually governed by the laws of the prior sovereignty, which are designated municipal and relate to the relations which the inhabitants bear to each other, still such laws are continued in force by the grace of the invader. Although this usage is well established, no one will deny that a conqueror has the right, as a war measure, to annul said laws, should he determine it to be his advantage in the war so to do.

The successful invader may also designate by whom the laws shall be administered. He may permit or *require* the old officials to continue to discharge the duties of their offices the same as before the occupation, or he may impose conditions upon which they may continue in office, or he may displace all of them and appoint others in their places. This he does because he is engaged in a war and is at liberty to judge for himself what necessity requires and therefore justifies.

In his application herein Nava says:

Hence, no interference with private property rights could possibly be justified, *except on the ground of military reasons*, and here military reasons were neither given nor did they exist.

It is unnecessary to argue the proposition that in time of war the commander of a military force is the sole judge of existing military necessity, and can not subsequently be called to account for it by the enemy. As between the major-general in command of its invading army actively engaged in the conduct of a war, and an adherent of the sovereignty against which said war was waged, reliance will be had upon the judgment of the officer of the United States Army.

The war was not ended by the protocol of August 12, 1898. The condition of war continued until the treaty was signed, if not until the ratification had been mutually exchanged. Nava was deprived of his office by the proper exercise of a lawful authority. Therefore his rights therein ceased in October, 1898. It follows that he possessed no rights to be guaranteed by the treaty of December 10, 1898.

Since his office was taken away as a military measure, a means of promoting the purposes of the United States as a belligerent, his claim for damages falls within the provisions of Article VII of the treaty of peace, as follows:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

I therefore recommend the rejection of this claim.

The action of the War Department on this claim was as follows:

WAR DEPARTMENT,  
*Washington, September 21, 1899.*

SIR: In the matter of the claim of Antonio Alvarez Nava y Lobo for the sum of \$30,000 damages for being deprived of the office of notary, held by him in San Juan, P. R., under Spanish régime, which was transmitted by your indorsement of the 19th ultimo, I have the honor to inclose herewith for your information copy of the opinion of Judge C. E. Magoon, law officer of the division of customs and insular affairs of this Department, wherein he recommends the rejection of said claim, which opinion is approved by this Department.

Very respectfully,

G. D. MEIKLEJOHN,  
*Acting Secretary of War.*

Brig. Gen. GEO. W. DAVIS,  
*Governor-General of Porto Rico, San Juan, P. R.*

### MEMORANDUM FOR THE SECRETARY OF WAR.

[Submitted December 12, 1899. Case No. 1207, Division of Insular Affairs, War Department.]

The questions presented are as follows:

1. Do the municipalities of Porto Rico, under the conditions now existing in the island, possess the right to contract loans and issue bonds for public improvements?
2. What method or procedure must be followed in exercising said right?

The municipalities of Porto Rico undoubtedly possessed and exercised this right under the Spanish régime.

The Spanish provincial and municipal laws of Porto Rico (decree December 31, 1896) do not in direct terms confer the authority under consideration. The municipal laws of 1846 did specifically empower municipalities to contract loans. The municipal laws promulgated since then have not specifically referred to such power. But that said power existed is authoritatively declared by the royal decree of June 30, 1880. This decree is a rescript as to the exact questions under consideration, and for that reason is quoted in full, as follows:

#### LOANS.

ROYAL ORDER OF JUNE 30, 1880, RESOLVING THAT MUNICIPAL COUNCILS MAY CONTRACT LOANS, CASES IN WHICH THEY MUST DO SO, AND RULES ISSUED THEREFOR.

The colonial secretary communicated to His Excellency the governor-general of this island, under date of June 3 last, the following royal order:

YOUR EXCELLENCY: I have informed His Majesty the King (whom God preserve) of the letter from Your Excellency of March 14 last requesting information as to whether municipal councils may contract loans and the manner of doing so. All that is stated to Your Excellency by several municipal councils and by the council of administration of that island has been noted. And taking into consideration: (1) That the

municipal law of 1846 empowered municipal councils to contract loans with the intervention of the Government by reason of the supervision it exercised over popular corporations with regard to the local rights and interests. (2) That the silence observed on the subject by the latest legislation of 1867 and 1870 applied to Cuba and Porto Rico should be interpreted as inspired by the opinion that the local corporations to which is intrusted the government and administration of its rights and interests are in a status of local independence, and giving to the greater number of their resolutions a final character unless general interests are involved or interests of third persons, thus requiring the interference of the Government or of its representatives in the provinces. (3) That from this special character of the new laws there is deduced that municipal councils may take refuge in the contraction of loans as a means of satisfying their obligations. (4) That the section of government of the council of state has fixed in this respect as jurisprudence that when a loan does not affect the real estate of the municipality, or the property rights or bonds of the debt referred to in article 80 of the law of the Peninsula, there is no reason for the Government to grant or refuse authority to contract the loan, because it is an ordinary resolution over which the Government has no jurisdiction; but this is not the case when the contract may involve the property or the rights mentioned in the said article, on account of the necessity of selling the mortgages created, or for any other reason whatever, it then being the duty of the Government to grant the authority, the approval of the same being necessary for resolutions affecting said properties. (5) That in accordance with article 134 of the municipal law the construction of taxes by the municipal councils must always be approved by Your Excellency after certain proceedings as the only competent authority to authorize loans, no matter what their character may be, without the circumstance of the law not foreseeing the same being an obstacle to their authorization by Your Excellency, and which must be communicated to this department for the purposes of the high inspection which appertains to the same in all branches of the public service. (6) That the law in conferring upon the authority of Your Excellency the approval of loans also empowers you to fix the conditions under which they are to be contracted for the payment of debts, as well as for the raising of funds for other municipal requirements. (7) And, finally, that while special rules applicable to the matter are approved, Your Excellency is informed, in a royal order of this date, that it is advisable to adopt the rules which you recommend in your letter of March 14, namely: (1) That the loans be resolved upon by a majority of the municipal board. (2) That the provincial deputation, the council of administration, and the government of that island report on the proceedings. And (3) that the resolution be of the exclusive competency of Your Excellency, making a report to this department; His Majesty the King (whom God preserve) has deemed proper to order that Your Excellency be informed in accordance with the opinion of the council of state in full: (1) That the municipal law in force does not oppose municipal councils contracting the loans they may consider necessary in order to attend to the requirements of the municipality. And (2) that the competent authority to approve and authorize loans is your excellency, and that the institution and resolution of the proper proceedings must be subjected for the present to the same rules you recommend in your official letter of March 14 last, your decision being communicated to this department.

And His Excellency having ordered the enforcement of the foregoing royal order, it is published in the official gazette, supplemented with the rules which are to be observed for the fulfillment of the same. Habana, July 2, 1880. Joaquin Carbonell, Secretary of the General Government.

#### RULES CITED.

1. The loan is to be resolved upon by a majority of the municipal board.
2. The provincial deputation, the government of the province, and the council of administration must report on the proceedings.



3. The resolution of the matter shall be of the exclusive competency of the governor-general.

With regard to the conditions to which loans are to be subject, two classes may be stated:

1. Loans destined to the payment of debts.
2. Loans destined to the raising of funds in order to attend to the various requirements, and especially for the construction of works of public utility.

The loans of the first class may consist in the emission of obligations to a sufficient amount, each one reduced in order that they may be applied to the payment of all the debts to be satisfied, and the interest which the obligations are to bear can not exceed the average of the legal interest on money during a number of years equal to that for which the amortization of the loan is to be continued.

The loans the object of which is to raise funds for the construction of works, or to liquidate debts which can not be satisfied with obligations, must be contracted by means of a public auction, in which the amount of interest of the issue shall be the subject of the bids, whether they are to be issued at par, or on the rate of the issue, if the interest is previously fixed, with subjection to the document of conditions relating to the provisions in force on the subject.

The municipal board in instituting the proceedings requesting authority to negotiate loans must state concretely each and every one of the purposes to which the funds obtained by virtue of the loan are to be destined and the amount of the same, as well as the manner and the period in which the amortization is to take place and the annual sums required thereby and for the payment of interest, and if the latter may be obtained from the revenues of the ordinary budget or whether extraordinary taxes are to be established or an increase in the assessment.

The following extracts from the municipal law of Porto Rico (decree of December 31, 1896) show the authority and obligation of municipalities as to public works and improvements, and to enter into contracts and incur liabilities therefor. (See municipal law of Porto Rico, Trans. Div. Ins. Affrs.):

ART. 29. In each district there shall be a municipal council and a municipal board.

ART. 33. In their character of administrative authorities municipal councils shall exercise jurisdiction over the entire municipal district or the territory to which their action extends in the manner and form determined by the laws.

ART. 35. It is the duty of municipal boards to establish and create means to obtain funds at the time and in the manner ordered by this law, as well as to revise and audit the accounts of municipal councils.

ART. 74. Municipal councils are financial administrative corporations, and may only exercise the functions intrusted to them by the laws. Their title is impersonal.

ART. 75. The government and administration of the private interests of towns is under the jurisdiction of municipal councils, subject to the laws, and particularly in all that refers to the following subjects:

First. Establishment and creation of municipal services referring to the arrangement and ornamentation of public roads, comfort and hygiene of the neighborhood, encouragement of its material and moral interests, and security of persons and property, as follows:

1. Opening and survey of streets and parks, and of all kinds of roads of communication.
2. Paving, lighting, and sewerage.
3. Water supply.
4. Promenades and trees.
5. Bathing establishments, laundries, market houses, and slaughterhouses.

6. Fairs and markets.

7. Institutions for instruction and sanitary services.

8. Municipal buildings and in general all kinds of public works necessary for the fulfillment of the services, subject to the special legislation on public works.

9. Surveillance and police.

Second. Urban and rural police; that is, all that refers to the good order and surveillance of the established municipal services, care of public roads in general, cleanliness, hygiene, and health of the town.

Third. Municipal administration, which includes the use, care, and preservation of all estates, property, and rights belonging to the municipality, and to the establishments depending therefrom, and the determination, distribution, collection, investment, and account of all receipts and imposts necessary for the execution of the municipal services.

The royal decree of November 25, 1897, establishing autonomy in Cuba and Porto Rico provides (see constitution establishing self-government in Cuba and Porto Rico, Trans. Div. Ins. Affrs.):

ART. 61. The provincial and municipal laws now obtaining in the island shall continue in vogue (?) wherever not in conflict with the provisions of this decree until the insular parliament shall legislate upon the matter.

The decree of autonomy, however, made important changes in the existing law regarding municipal finances by providing as follows:

ART. 52. \* \* \* Every legally constituted municipality shall have power to frame its own laws regarding public education, \* \* \* municipal finances. \* \* \*

ART. 55. The municipalities, as well as the provincial assemblies, shall have power to freely raise the necessary revenue to cover their expenditures, with no other limitation than to make the means adopted compatible with the general system of taxation which shall obtain in the island. The resources for provincial appropriations shall be independent of municipal resources.

ART. 62. No colonial statute shall abridge the powers vested by the preceding articles (52-62) in the municipalities and provincial assemblies.

ART. 69. Every municipal measure for the purpose of contracting a loan or a municipal debt shall be without effect, unless it be assented to by a majority of the townspeople whenever one-third of the number of alderman shall so demand. The amount of the loan or debt which, according to the number of inhabitants of a township shall make the referendum proceeding necessary, shall be determined by special statute.

From the foregoing it clearly appears that under Spanish sovereignty the municipalities of Porto Rico possessed the right to make loans and issue bonds therefor.

Such rights as the municipalities possessed in matters of this character were retained upon cession of the island to the United States. The right of municipalities to enter into contracts and incur liabilities for the purpose of securing public improvements is in harmony with the character and institutions of our Government. Upon the change of sovereignty being affected, this right did not cease, but the municipalities continue to possess it.

The broad ground on which this doctrine rests is as follows:

The conqueror who acquires a province or town from the enemy acquires thereby the same rights which were possessed by the State from which it is taken. If it

formed a constituent part of the hostile State, and was fully and completely under its dominion, it passes into the power of the conqueror upon the same footing. \* \* \* The case, however, is different where the enemy possessed only a quasi sovereignty or limited political rights over the conquered province or town. The conqueror acquires no other rights than such as belonged to the State against which he has taken up arms. "War," says Vattel, "authorizes him to possess himself of what belongs to his enemy. If he deprives that enemy of the sovereignty of a town or province he acquires it, such as it is, with all its limitations and modifications. Accordingly, care is usually taken to stipulate \* \* \* that the towns and countries ceded shall retain all their liberties, privileges, and immunities." (Halleck's Int. Law, 3d ed., chap. 34, sec. 2.)

The right under consideration is of such kind and character as bring it within the protection of Article VII of the late treaty with Spain. (Halleck's Int. Law, chap. 33, sec. 12.)

In a letter to this Department, dated July 10, 1899, with reference to the Dady contract with the city of Habana, Cuba, Attorney-General Griggs says (22 Op. 527-528):

By well-settled public law, upon the cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which are designated as municipal continue in force and operation for the government and regulation of the affairs of the people of said territory until the new sovereignty imposes different laws or regulations. Those laws which are political in their nature and pertain to the prerogatives of the former Government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace, or discretion of the former sovereign would probably be held to be ineffective under the succeeding power. \* \* \* Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the proper authorities of the United States may change or modify either the form or the constituents of the municipal establishments; may, in place of the system and regulations that formerly prevailed, substitute new and different ones.

Upon this line, the same authorities, exercising sovereignty over the islands, have the power to provide the methods, terms, and conditions under which municipal improvements, which relate entirely to property belonging to the municipality or held by it for public use, may be carried on. The old provisions of the Spanish law may be adopted, so far as applicable, or they may be entirely dispensed with, and a new system, set up in their place. The municipal authorities of Habana, in the matter of engaging in the construction of public works, may be permitted to proceed under such law as is now applicable, if that be adequate, or they may, at the will of the military commander, be restrained from engaging in any such works.

I am of the opinion that the provisions of the Spanish municipal laws of 1896, modified by the decree of autonomy of 1897, under consideration herein, are in force in Porto Rico at the present time, and that it is unnecessary to reestablish them by order or otherwise. (American Ins. Co. v. Canter, 1 Pet., 542; Halleck's Int. Law, chap. 34, sections 14 to 24.)

The procedure to be followed in this matter is that prescribed by

the municipal law of 1896, modified by the decree of autonomy, and is as follows:

1. The project is to be submitted to the municipal council (*ayuntamiento*), a body consisting of the mayor (*alcalde*) and the councilmen, for its decision on the advisability of making the loan, and the terms and conditions thereof.

2. The matter being favorably acted upon by the *ayuntamiento* is then referred to the municipal board, a body composed of the *ayuntamiento* and the *junta municipal*. The *junta* consists of "members, in equal numbers to councilors, appointed from among the taxpayers." (Art. 67.)

3. The matter is then to be advanced under the referendum proceedings required in article 69 of the decree of autonomy, as follows:

Every municipal measure for the purpose of contracting a loan or a municipal debt shall be without effect unless it be assented to by a majority of the townspeople whenever one-third of the number of aldermen shall so demand.

4. The requirements of the Spanish law relating to publication in the Official Bulletin and the Official Gazette of public contracts and documents should be complied with.

5. Final action by municipal council, i. e., declaring existence of contract, signing, sealing, and issuing of bonds.

6. The bonds should be sold to the highest bidder and the proceeds placed in the public treasury.

In 1896 the city of San Juan, Porto Rico, negotiated a loan of 500,000 pesos, for which the bonds of the municipality were given. The procedure followed was that above outlined, excepting as to the referendum. The decree of autonomy had not been issued, and under the law of 1896 the project was approved by the provincial deputation.

In addition to selling the bonds and using the money realized to pay for the construction of public works, I believe the municipalities of Porto Rico may lawfully contract for public work and pay the contractor in bonds.

The general law of public works for the island of Porto Rico provides:

ART. 48. Municipal councils may construct their works by management or by contract, subject to the provisions of the present law concerning this matter, in connection with the works in charge of the state and of the province. (Trans. Div. of Ins. Affrs. p. 14.)

Under Spanish régime in Porto Rico, when it was desired to construct a public improvement by contract and pay therefor in bonds, the proposition in regard to the bonds and all matters relating thereto were embraced in the contract proceedings, and known as the "economic" or financial branch of the project as distinguished from the "technical" or engineering branch. The "project" pursued the course prescribed for municipal contracts, which was essentially the

same as that herein described. Such differences as exist are not of sufficient importance to require recital and consideration at this time. The extent to which the exercise of said powers by municipalities may be regulated and controlled by the military authorities of the United States now in charge of the civil government of the island is considered to be sufficiently discussed in the quotation from the opinion of the Attorney-General.

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Without determining the questions discussed in the foregoing report, the Secretary of War decided to continue in force the order prohibiting the municipalities of Porto Rico from incurring indebtedness until such time as Congress, by appropriate legislation, should make provision for the exercise of authority by municipalities and other political subdivisions in Porto Rico.

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### IN RE GRANTING MUNICIPAL FRANCHISES BY THE MUNICIPALITIES OF PORTO RICO.

[Submitted October 9, 1899. Case No. 105, Division of Insular Affairs, War Department.]

1. The municipalities of Porto Rico were empowered by the laws of Spain to grant concessions or franchises within their several territorial limits where the privileges granted relate to the use and occupation of streets or other property owned in fee by the municipalities.
2. The rights of ownership, including that of alienation, possessed by the municipalities under the dominion of Spain, continued under military occupancy and after the cession of the island to the United States.
3. General Orders, 188, A. G. O., 1898, is a regulation of the exercise of the right; it does not affect the existence of the right.
4. The exercise of the rights of ownership over property by municipalities in Porto Rico while under the provisional government now in charge of civil affairs in the island should be in accordance with the requirements of said General Orders, 188, A. G. O., and the Spanish laws and regulations of municipalities in force in Porto Rico at the time the island was ceded to the United States, excepting such provisions as required the assent and approval of the officers of the Crown of Spain to the proceedings under said laws and regulations.
5. The provisional government now in charge of civil affairs in Porto Rico is a part of the government of each municipality in the island as well as of the government of the island considered as a whole. It is charged with the direction and control of the municipal powers as well as of the sovereign powers of administration and execution, and in granting concessions the municipal authorities are subject to such conditions as may be imposed by the provisional government.

The treaty with Spain provides that the property rights of municipalities are to be respected the same as are those of individuals. (Article 8.)

Halleck says:

A municipality has the same rights as a natural person to dispose of its property during a war, and all such transfers are *prima facie* as valid as if made in time of

peace. If forbidden by the conqueror, the prohibition is an exception to the general rule of public law and must be clearly established. (Halleck's Int. Law, 3d ed., chap. 33, sec. 12; Kent's Com. on Am. Law, vol. 1, p. 92.)

Military occupation produces no effect on private ownership of property, and it follows as a necessary consequence that the ownership of such property may be changed during such occupancy precisely the same as though such occupancy did not exist. The right to alienate is incident to ownership, and, unless restricted by the victor, the right of alienation continues the same during military possession of the territory in which it is situated as it was prior to the military occupation.

The possession of this right by the municipalities of Porto Rico is fully recognized by the United States, but its exercise has been restricted by General Orders, 188, A. G. O., promulgating Executive order dated December 22, 1898, as follows:

EXECUTIVE MANSION,  
Washington, December 22, 1898.

Until otherwise ordered, no grants or concessions of public or corporate rights or franchises for the construction of public or quasi-public works, such as railroads, tramways, telegraph and telephone lines, waterworks, gas works, electric-light lines, etc., shall be made by any municipal or other local governmental authority or body in Porto Rico, except upon the approval of the major-general commanding the military forces of the United States in Porto Rico, who shall, before approving any such grant or concession, be so especially authorized by the Secretary of War.

WILLIAM MCKINLEY.

*If prior to the treaty of cession a municipality in Porto Rico possessed property rights in and to its streets or other lands, and possessed the power of alienation, such power would continue thereafter until changed by legislative authority.*

The treaty of peace with Mexico (May 30, 1848) contained the same provisions in regard to the protection of property rights as are secured by Article VIII of the treaty of peace with Spain (December 10, 1898). (U. S. Stat. L., vol. 9, p. 929, Art. VIII.)

Prior to the invasion of California the pueblo or village of San Francisco existed, and, under the laws of Mexico, was entitled to the territory within certain prescribed limits known as "pueblo lands." It had also an *ayuntamiento* or town council and an *alcalde*. The *alcalde* was the chief executive officer of the *pueblo*, and as such had authority to make grants of the *pueblo* lands. The exercise of this function was subject to the authority of the town council and to the higher authority of the departmental governor and assembly. The claim was made that *pueblo* lands which had not been granted to individuals prior to the conquest became a part of the public domain of the United States, and, as such, subject to the exclusive control and disposition of Congress. The supreme court of California held, however, that such was not the effect of the conquest, but that the lands

continued to be the public property of the municipality as before the war, and that the laws of Mexico relating to the subject continued in force until changed by the legislative authority of the State. It was further held that an *alcalde* grant made after the conquest was presumed to be valid and was competent to convey title. (Cohas *v.* Raisin, 3 California, 443; Hart *v.* Burnett, 15 California, 530; Payne & Dewey *v.* Treadwell, 16 California, 221; White *v.* Moses, 21 California, 34.)

This doctrine is referred to and followed by the United States Supreme Court in *Merryman v. Bourne* (9 Wall., 592). This case arose in California, and as the doctrine was a rule of property adopted by the supreme court of that State it was binding upon the Federal courts; but the United States Supreme Court followed it without criticism and impliedly approved it. (See also *Moore v. Steinbach*, 127 U. S., 70, 81.)

It is well to call attention to the fact that the foregoing doctrine applies only to such property as belonged absolutely to the municipality before the change in sovereignty. A municipality would be powerless to alienate or affect the title to lands or other property which passed to the United States under the terms of the treaty of peace with Spain. In *Moore v. Steinbach* (127 U. S., 70, 81) the Supreme Court of the United States say:

The doctrine invoked by the defendants that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him does not aid their defense. That doctrine has no application to laws authorizing the alienation of any portions of the public domain or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject.

The laws of Spain fully recognize the right of cities, towns, and villages to acquire and dispose of real estate subject to the royal regulations which were made from time to time for that purpose. When once acquired by a municipality neither the Crown nor its officers can take away or grant to others any of these municipal lands. (Novísima Recopilación, Lib. VII, tit. 16, law 1.) The manner of granting lands to towns and the manner in which they were allowed to rent and dispose of them was not uniform. It depended upon royal regulations, which were changed from time to time. At one period the towns could grant or sell them and at another they could only lease them. These grants, sales, and leases were always made by the municipal authorities, with the permission of the Crown, but neither the King nor the Crown officers could themselves dispose of the lands once granted to or acquired by the towns.

*Did the municipalities of Porto Rico own the fee of their streets under the Spanish régime?*

When a town is laid out under the general law of Spanish depend-

encies, the title to the town site is secured by the *pueblo* or town, the location is platted, and the lots sold for the benefit of the town, the proceeds going into the town treasury. So much of the land as is dedicated to public use as streets becomes public property. The streets which are constructed and maintained with national funds belong to the State or Crown. The streets constructed and maintained with municipal funds belong to the municipality. The Spanish civil code provides as follows:

ARTICLE 339. To public domain belong:

1. Those intended for public use as roads, canals, \* \* \* and bridges, *constructed by the State.* \* \* \*

ARTICLE 343. The property of provinces and of towns is divided into property of public use and patrimonial property.

ARTICLE 344. Property for public use in provinces and towns comprises the provincial and town roads, the squares, streets, fountains and public waters, the walks, and public works for general service *paid for by the same towns or provinces.*

The Spanish code defines "ownership" as follows:

ARTICLE 348. Ownership is the right to enjoy and *dispose of* a thing without further limitations than those established by the laws.

Under the provisions of the Spanish law a municipality, by following a prescribed procedure, might burden the public property owned by the town with easements or concessions, or it could alienate it entirely.

On February 27, 1864, the "general directive body in charge of the registers" decided that record is permissible of an instrument whereby a municipal council attempts to alienate in whole or in part the lands dedicated to public highways in a municipality. (*Leyes Civiles de España*, Madrid, 1893; *Ley Hipotecaria*, title 1, par. 2, note 2.)

Under the laws of Spain the register of deeds and conveyances passes upon the title and legal effect of the instrument of conveyance before permitting the registration. If he decides that the title is defective or the conveyance unauthorized, he refuses registration. Thereupon an action may be commenced against him to compel registration. The action is in the nature of an appeal from the decision of an administrative officer and in a measure resembles a mandamus proceeding. The case above referred to was of this character, and the determination was in favor of the right of the city to alienate its rights to the streets.

Independent of the question of owning the land occupied by the streets and the appurtenant right of alienation, the municipalities of Cuba were by Spanish law empowered to regulate and control the use of the streets maintained by them.

Many franchises consist of the right to use a portion of the streets of a municipality for a certain purpose. Such a franchise does not ordinarily convey title; it simply permits use in a prescribed manner



for a desired object. The Spanish laws authorized the municipalities of Porto Rico to grant such permits. (Municipal Laws of Porto Rico, arts. 69, 70; General Laws of Public Works of Porto Rico, arts. 6, 10; Regulations for said Laws of Public Works, art. 91; Laws of Railroads for Porto Rico, arts. 28, 75; Regulations for said Laws of Railroads, art. 104; Leyes Civiles de España, Madrid, 1893, Ley Hipotecaria, Title 1, par. 2, note 2.)

*What procedure is to be followed in the exercise of the rights of ownership in property owned by municipalities in Porto Rico?*

The first step is to secure the permission to exercise said rights required by said General Order, 188, A. G. O., hereinbefore set out. The exercise of said rights being permitted, the municipality must act by and through its officers or agents. These officers are not authorized to dispose of the property of the municipality as though it belonged to them personally. They can dispose of said property only when authorized so to do by an existing law, and if the law prescribes a method for the exercise of such authority, that method must be pursued.

Since the legislative branch of the United States Government has not acted upon this matter, it follows that such laws, if any exist, must be the Spanish laws in force at the date of the cession.

It is a well-established doctrine that where territory is ceded by one sovereignty to another the laws of the former sovereign authorizing the alienation of any portion of the public domain and the authority of officers charged under the former government with that power pass away. (*More v. Steinbach*, 127 U. S., 70, 81; *Ely's Admr. v. United States*, 171 U. S., 220, 230; *United States v. Vallejo*, 1 Black., 541; *Harcourt v. Gaillard*, 12 Wheat., 523.)

In *More v. Steinbach* (127 U. S., 81) the court announce this doctrine, and base it on the proposition that—

No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject.

I am of the opinion that this doctrine is not involved herein. The streets owned by the municipalities of Porto Rico do not belong to the national public domain and are not public property in the sense that the sovereign has property rights therein.

I am of the opinion that the Spanish laws under consideration are of such character that they remain in force, modified in the matter of regulation by the officers of the Crown of Spain.

In *Chicago, Rock Island and Pacific Railway Company v. McGlinn* (114 U. S., 542) the court say (p. 546):

It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country—that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. By

the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceable use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.

The difference between those laws which relate to the alienation of the public domain and those which relate to the exercise of the rights of ownership by municipalities is referred to by the court in *More v. Steinbach*. In that case the court held that the authority and jurisdiction of the Mexican officials in California terminated on July 7, 1846, and thereafter they “could do nothing that would in any degree affect the right of the United States to the public property.” (127 U. S., 80.)

But the court further say:

The cases in the supreme court of California and in this court which recognize as valid grants of lots in the pueblo or city of San Francisco by alcaldes appointed or elected after the occupation of the country by the forces of the United States do not militate against this view. Those officers were agents of the pueblo or city and acted under its authority in the distribution of its municipal lands. They did not assume to alienate or affect the title to lands which was in the United States (p. 81).

In *Merryman v. Bourne* (9 Wall., 592, 601) the court say:

The conquest of California by the arms of the United States is regarded as having become complete on the 7th of July, 1846. On that day the Government of the United States succeeded to the rights and authority of the Government of Mexico. The dominion of the latter sovereignty was then finally displaced and succeeded by that of the former. Before that time the pueblo or village of San Francisco existed, and under the laws of the country was entitled to the territory within certain prescribed limits, known as pueblo lands. It had also an ayuntamiento, or town council, and an alcalde. The alcalde was the chief executive officer of the pueblo, and as such had authority to make grants of the pueblo lands.

The exercise of this function was subject to the authority lodged in the ayuntamiento, and to the still higher authority of the departmental governor and assembly. In the case of *Woolworth v. Fulton* it was held by the supreme court of the State that from the time of the conquest these pueblo lands, so far as they had not been granted to individuals, became a part of the public domain of the United States and, as such, subject to the exclusive control and disposition of Congress. This doctrine was subsequently overruled in the case of *Cohas v. Raisin*. It was there held that the conquest had no such effect, but that the lands continued to be the public property of the municipality, as before the war, and that the laws of Mexico relating to the subject continued in force until changed by the legislative authority of the State.

It was further held that an *alcalde* grant, made after the conquest, was to be presumed valid and was competent to convey title. These doctrines are now firmly established as a part of the rules of property of the State.

In *Townsend v. Greeley* (5 Wall., 326) the court say (p. 334):

The treaty of Guadalupe Hidalgo does not purport to divest the pueblo, existing at the site of the city of San Francisco, of any rights of property, or to alter the character of the interests it may have held in any lands under the former government. It provides for the protection of the rights of the inhabitants of the ceded country to their property; and there is nothing in any of its clauses inducing the inference that any distinction was to be made with reference to the property claimed by towns under the Mexican Government. The subsequent legislation of Congress does not favor any such supposition, for it has treated the claims of such towns as entitled to the same protection as the claims of individuals, and has authorized their presentation to the board of commissioners for confirmation. (See also *Grisar v. McDowell*, 6 Wall., 363.)

The case of *Palmer v. Low* (98 U. S., 1) involved conflicting claims of title to a piece of ground in San Francisco, Cal. The court sustained a title derived as follows:

On the 19th of July, 1847, George Hyde was the duly qualified and acting *alcalde* of the pueblo of San Francisco, and as such *alcalde*, on the day last mentioned, granted the premises in controversy to George Donner, by a grant thereof duly made, recorded, and delivered by the *alcalde*. (P. 5.)

In *Cohas v. Raisin* (3 California, 443), the court held (syllabus):

Before the military occupation of California by the Army of the United States, San Francisco was a Mexican pueblo, or municipal corporation, and was invested with title to the lands within her boundaries.

The occupation and subsequent acquisition of California by the United States did not suspend or determine any rights or interest of San Francisco in such lands.

The pueblo retained during the war all its rights to municipal lands which had been conferred upon it previous to the war. The right to alienate is incident to that of ownership. The pueblo had the same right to dispose of its property during the war as a natural person.

In *Welch v. Sullivan* (8 California, 165) the court held that in California—

The pueblos, under the laws of Spain and Mexico, had the right to dispose of certain lands within their limits, to defray municipal expenses.

The municipal law remained unchanged after the conquest until 1850, and grants of pueblo lands by American *alcaldes* were grants by the pueblo of its own property, which it had a right to transfer.

In the body of the opinion the court say (p. 197):

It is a misnomer to call these titles American *alcalde* grants. They were the grants of the pueblo of its own property, which it had the right to transfer by virtue of the municipal law which was continued in force by the new sovereign until 1850. (See, also, *Dewey v. Lambier*, 7 Cal., 347; *Hart v. Burnett*, 15 Cal., 530; *Payne and Dewey v. Treadwell*, 16 Cal., 232; *White v. Moses*, 21 Cal., 34.)

Under Spanish law the town possessed the ownership, but the right to convey, which is ordinarily an inherent attribute of ownership, was

curtailed and made dependent upon the will of the King or his officers. Upon the sovereignty of Spain being expelled from the island of Porto Rico this limitation upon the right of the owner to transfer departed with the deposed sovereignty. The provisions of the Spanish law authorizing cities and towns to own and convey land and other property are in harmony with the political institutions of the United States and are continued in force in Porto Rico. The provisions of the regulations of the Crown of Spain that the right to transfer and convey can be exercised only by and with the consent of the King of Spain or his officers are not in harmony with the political institutions of the United States, but are odious thereto and incompatible with the changed condition in Porto Rico. Therefore such regulations are no longer in force in that island. Therefore the municipalities thereof may alienate the land and other property owned by them in accordance with the provisions of the Spanish law relative thereto, saving and excepting the provisions requiring the assent or consent to such alienation by the Crown of Spain or its officers.

While the authority of the officers of the Crown of Spain to direct and control the action of municipalities in these matters has ceased, the local officers of the municipalities are not without restraint in the exercise of their rights. By reason of the character of the provisional government existing in Porto Rico, the military authorities of the United States now in charge of said government are a part of the municipal government as well as the general government. Being a part thereof their action must be had in this and other matters. The extent of their powers in Cuba is set forth by Attorney-General Griggs as follows (see letter to Secretary of War, July 10, 1899):

Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the proper authorities of the United States may change or modify either the form or the constituents of the municipal establishments; may, in place of the system and regulations that formerly prevailed, substitute new and different ones. Upon this line the same authorities exercising sovereignty over the island have the power to provide the methods, terms, and conditions under which municipal improvements, which relate entirely to property belonging to the municipality or held by it for public use, may be carried on. The old provisions of the Spanish law may be adopted, so far as applicable, or they may be entirely dispensed with and a new system set up in their place. (22 Op. 528.)

The proceedings required in granting a franchise or concession by a municipality under the Spanish laws are (in general) as follows: The promoter presents a general project. If approved by the municipal council he prepares detailed plans and specifications. These being approved, their commercial value or price is fixed by appraisement. Advertisement is made that a concession or franchise for the execution of said plan will be sold to the highest bidder or the bidder offering the terms and conditions most favorable to the city, bids to be

received at a given time and place. Bids must be in writing and accompanied by 1 per cent of the estimated cost of the project. The original promoter has the privilege of being substituted for the best bidder. If he declines to be substituted, the original bidder must pay him the appraised value of the plans and specifications. The successful bidder then deposits 3 per cent of the estimated cost of the project as a guaranty of good faith, and the franchise is granted. The Spanish laws do not authorize municipal franchises which are exclusive or perpetual. They permit the use of streets or other public property in a prescribed manner for a designated purpose. With the exception of the provisions relating to the authority exercised by the officers of the Crown, said laws are in harmony with the political institutions of the United States. Relieved from the controlling influence of the Crown officials and subjected to the restraint of the provisional government now in charge of civil affairs in the island, said laws furnish an excellent means and method for disposing of municipal franchises and the regulation thereof. The provisions of said laws are known and understood by the inhabitants and officials of the municipalities. Their enforcement would create no animosity. The relief afforded by freeing the exercise of municipal right from the dictation of the officers representing the Spanish sovereign would be universally understood and therefore more highly appreciated than if the old law were abrogated and a new law substituted.

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Without determining the questions discussed in the foregoing report the Secretary of War decided to continue in force the provisions of Executive order dated December 22, 1898 (G. O., 188, A. G. O., 1898), until Congress, by appropriate legislation, should provide for the exercise of authority by municipalities and other political subdivisions in Porto Rico.

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**IN THE MATTER OF THE APPLICATION OF FERMIN SAGARDIA,  
AN INHABITANT OF PORTO RICO, FOR COMPENSATION FOR  
DAMAGES OCCASIONED BY HIS PROPERTY BEING STOLEN,  
INJURED, AND DESTROYED BY ROBBERS INFESTING THE  
LOCALITY OF HIS RESIDENCE.**

[Submitted November 23, 1899. Case No. 1087, Division of Insular Affairs, War Department.]

The amount demanded by this applicant is \$24,345. It is not claimed that the loss was occasioned or the damages inflicted by the United States troops, agents, or representatives. It is admitted that the loss was occasioned by robbers and bandits. Therefore the facts are not sufficient to constitute a claim for lawful damages or equitable relief in favor of the applicant and against the Government of the United

States or the military government now in charge of civil affairs in Porto Rico.

The military governor of the island reports that "there are a considerable number of claims similar to this." The military governor further says in his report herein: "The statement has been made that the aggregate of these losses in Porto Rico may reach several million dollars."

It is readily perceived that if a solvent government undertook to reimburse the inhabitants of its country for losses occasioned by theft and other unlawful or criminal acts of lawless persons, the *bona fide* claims would soon aggregate millions of dollars, while the *mala fide* claims would be limited only by the cupidity of claimants and the credulity of the government officials. But such indemnity is not afforded by any government either in time of peace or war. That such is the rule must certainly be known among the people of Porto Rico. If a contrary rule should be adopted it would of course be very gratifying to those who have suffered losses of this character and to those who would willingly perpetrate a fraud upon this Government which would benefit them financially, but the proposition involved is as preposterous as the results of such adoption would be deplorable. The claim should be rejected.

General Davis in his indorsement herein says:

If it is desired that any investigation be made as to the extent of these losses, etc., instructions are requested.

The investigation of such claims gives them a certain dignity and leads the claimant to expect favorable action and induces others to make similar claims. This should not be tolerated, much less encouraged.

The officers of the United States Army and other persons engaged in the conduct of the affairs of the provisional government of Porto Rico should not be employed in the useless task of investigating claims of this character. General Davis manifestly entertains this view and will doubtless be pleased to learn that this Department sustains it.

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The action of the War Department on this claim was as follows:

DECEMBER 1, 1899.

SIR: Referring to the claim of Fermin y Sagardia for reimbursement of the amount of alleged losses occurring through the depredations of robbers and other criminals, submitted by your reference of September 30 last, I have the honor to invite your attention to the inclosed copy of an opinion of the law officer, Division of Customs and Insular Affairs, which is approved by this Department.

Very respectfully,

G. D. MEIKLEJOHN,  
Assistant Secretary of War.

Brig. Gen. GEO. W. DAVIS,  
Military Governor of Porto Rico, San Juan, P. R.

**IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF  
RAMON MARTI Y BUGUET, A NATIVE OF TARRAGONA, SPAIN,  
WHO DIED AT BEAZ, SANTA CLARA, WITHOUT LEAVING A  
WILL.**

[Submitted March 19, 1900. Case No. 1075, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge your request for a report on the above-entitled matter, and in pursuance thereto I have the further honor to submit the following:

On July 2, 1899, a Spanish subject named Ramon Martí y Buguet, a native of Tarragona, Spain, died, intestate, at Beaz, Santa Clara, Cuba, leaving an estate the value and amount of which does not appear in the papers filed herein.

On the 15th of July the Spanish consul at Cienfuegos, having learned of the death of Martí, addressed a letter to the judge of Santa Clara, requesting that his consulate be permitted to administer upon the estate of the intestate. The Spanish consul based his request on article 44 of the alien law, put in force in the island of Cuba while Spanish dominion prevailed therein. (Translation of article 44 hereto attached, marked "Exhibit A.")

The court refused to comply with the request of the Spanish consul, and the estate was administered upon in accordance with the laws regulating the administration of estates of deceased natives of the island.

The court at Santa Clara based its refusal to comply with the request of the Spanish consul upon two grounds:

First. That it was not made to appear that the deceased had declared his intention, before a court of record, to continue his allegiance to the Crown of Spain, and therefore must be adjudged to have adopted the nationality of the territory in which he resided at the time of his death.

Second. That under Article XI of the treaty of peace with Spain (1898) Spaniards continuing to reside in the island of Cuba remain subject, in civil and criminal matters, to the jurisdiction of the courts of the country in which they reside, in accordance with the ordinary laws in force therein, in the same manner as citizens of the country.

The Spanish minister at this capital called the attention of the Government of the United States to this matter by letter to the Secretary of State. The Spanish Government, being unwilling to concur in the decision of the court at Santa Clara, requested the Government of the United States to annul the orders made regarding said estate by the judge of that court.

The State Department transmitted said letter to the War Department. In the letter of transmittal the honorable Secretary of State says:

The Department commends the note to your early and, if possible, favorable consideration, in view of the apparent soundness of the ground on which the Spanish minister's contention rests.

The matter was referred to Major-General Brooke, then in command in Cuba, for a report thereon. Major-General Brooke referred the matter to his secretary of justice, who reported in favor of sustaining the action of the court of Santa Clara.

Upon assuming command in Cuba Major-General Wood referred this matter to the new secretary of justice, who reported that he agreed with the report made by his predecessor and recommended that the action of the court of Santa Clara be sustained.

The matter is now presented to this Department for final determination by the Secretary of War.

I am of opinion that the judge of the court at Santa Clara was right in proceeding to administer upon this estate, but wrong in his conclusion that the deceased, by failing to declare before a court of record that he intended to adhere in allegiance to the Crown of Spain, must be held to have renounced such allegiance.

When the Government of Spain, in order to end the unhappy condition of war, determined to withdraw its dominion from the island of Cuba and submit the island and its inhabitants to the custody of the United States, it was not unmindful of the fact that many persons residing in the island desired to continue their allegiance to the Crown of Spain. The Spanish Government very properly desired to protect and preserve the personal and property rights of such residents. The Government of the United States, with equal propriety, consented to this laudable undertaking; hence arose the provisions of the treaty of peace in regard thereto, found in articles IX, X, and XI, which are intended to guarantee to Spanish subjects remaining in the islands certain rights and privileges. These articles are as follows:

#### ARTICLE IX.

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance, in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

#### ARTICLE X.

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

#### ARTICLE XI.

The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil, as well as criminal, to



the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

It will be noticed that Article IX guarantees Spanish subjects residing in Cuba the right to continue allegiance to the Crown of Spain and still remain in said territory, retain their rights of property, and to engage in business. These rights have not always been conceded to the inhabitants of territory which is surrendered as a result of war. Upon the cession of Alsace and Lorraine by France to Germany those inhabitants who desired to retain allegiance to France were required to leave the country.

Article IX also provides that Spanish subjects continuing in the territory surrendered shall "have the right to carry on their industry, commerce, and professions, *being subject in respect thereof to such laws as are applicable to other foreigners.*"

Article XI provides that Spanish subjects retaining their allegiance to Spain and remaining in the island shall be subject to the jurisdiction of the courts of the country wherein they reside and shall have the right to appear before such courts and to pursue the same course as *citizens of the country* to which the courts belong. This article makes it impossible to deny to Spanish residents the right to appear in the courts of the country and demand and receive a hearing therein on an *equal footing* with the *native citizens*. Many nations refuse this privilege to aliens. The right to invoke the powers of the courts is a privilege essential to the protection of all rights. The Spanish Government manifestly desired that its subjects domiciled in the territory surrendered should possess and retain this right and that in its exercise Spanish subjects so domiciled should have absolute equality with the native citizens.

In the marts of trade in Cuba a Spanish subject is a foreigner and his rights are limited by existing or future laws regulating the acts of grace by which a foreigner is permitted to engage in the commerce of the island. But in the courts a Spanish subject resident in Cuba has all the rights of a native citizen. Correlatively, such Spanish residents are subject to the jurisdiction of said courts.

When a man dies it becomes the duty of the authority charged with providing the protection which civilized government affords to take charge of his estate and see that it is disposed of, either in accordance with letters testamentary of the deceased or turned over and accounted for to his heirs. This duty is equally binding whether the man be a citizen, an alien, or a public enemy. Taking possession of the property is amply justified as an exercise of what is known as the police power of the state, but such exercise of authority is ordinarily considered an exercise of the right of the sovereign as *paterfamilias*.

In discharging the duties binding upon it as *parens patriæ* the sovereign utilizes the courts. The duties become incumbent upon the *parens patriæ* at the instant the proprietor of the estate dies, and therefore the right of the court instantly attaches, and thereupon the estate is considered as being in the "lap of the law." The legal status or standing in court of the estate is the same as was the standing in court of the individual at the time of his decease. What is the standing of a Spanish subject in the courts of Cuba? The test is supplied by the treaty, and the question is to be determined by the fact of his residence. If a Spanish subject is a resident of Cuba, his standing in court is the same as that of a native citizen of the island, and upon his death his estate comes into the custody and keeping of the courts of the island the same as would the estate of a deceased native.

Attention is directed to the fact that a Spanish subject not a resident of Cuba, but temporarily sojourning therein, is to be considered a foreigner, and his estate would be dealt with as would the estate of other foreigners. But a permanent resident who yields allegiance to the Crown of Spain is not so considered, nor can his estate be dealt with as that of a foreigner.

As has already been stated, the duty to protect the estates of deceased persons is incumbent upon the government, and the government in performing such service acts through the courts. These courts exist in the various communities throughout the island. To deny them authority in the first instance over the estates of persons dying in the island would render it impossible for the government to discharge the obligation; for in the absence of authority to take charge of the estates the property would be exposed to the cupidity of the lawless until a consul learned of the death and could proceed to reduce the property to his possession or to that of his agent. If the deceased Spanish subject was not a resident of Cuba at the time of his death, the court would still possess authority to take possession of his estate, but would be required to surrender it, upon demand, to the Spanish consul.

If the foregoing views are correct, it follows that upon demand being made by the Spanish consul for a surrender by the court of the estate of Martí, the question as to whether or not the jurisdiction of the court continued, was to be determined by the fact of residence and not the citizenship of the deceased at the time of his demise.

## II.

In passing upon the question of the citizenship of the deceased the court of Santa Clara held as follows:

Considering, first, that there is no evidence to show that Don Ramon Martí had obtained the registration required by article 9 of the treaty of Paris, concluded between Spain and the United States on the 10th December of last year, in order to retain his Spanish nationality, and considering that, until such registration is proved by record, he must be regarded as a native of Cuba and, consequently, sub-

ject only and exclusively to the provisions of the law of civil procedure and the civil code now in force. (See letter of Spanish minister to Secretary of State, p. 2, Doc. 1.)

I think this holding of the court of Santa Clara is contrary to the provisions of the treaty of peace with Spain (1898). The provisions of the treaty regarding the continuing in allegiance to the Crown of Spain by Spanish subjects residing in the islands are as follows:

In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year of the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to adopt the nationality of the territory in which they may reside. (Article IX.)

It is a fundamental doctrine of the theory of government prevailing in the United States that a man has the inherent right to tender his permanent allegiance to such sovereign as he sees fit and to bestow his allegiance upon such sovereign as sees fit to accept his tender. (Secs. 1999 and 2000, U. S. Rev. Stat.; 8 Op. Atty. Gen., p. 139; 9 Op. Atty. Gen., p. 356.)

The provisions of the treaty with Spain, above quoted, prescribe the rule of evidence by which is to be determined the question of whether or not Spanish subjects continuing to reside in said territory have consented to the transfer of their allegiance.

Under this rule they are given a year from the date of the exchange of ratifications to declare their decision in the matter. The presumption that they have consented to a change of allegiance does not arise until there is a default in making such declaration. They can not be held to be in default until the time has expired in which they may make the declaration. The ratifications of the treaty were exchanged at Washington, April 11, 1899. Consequently Spanish subjects residing in Cuba can not be held to be in default of making such declaration until April 11, 1900.

I therefore recommend that the Secretary of State be advised that the War Department entertains the view that the court of Santa Clara properly held:

1. That said court had jurisdiction to institute proceedings to administer upon the estate of Don Ramon Martí, deceased.

2. That the jurisdiction of said court was not ousted by the demand of the Spanish consul if the said Don Ramon Martí at the time of his death was a resident of Santa Clara, Cuba.

That the War Department does not agree with the holding of the court of Santa Clara—

1. That a presumption arises that said Don Ramon Martí had changed his allegiance from the fact that he had not, prior to July 2, 1899, declared his intention to retain his allegiance to the Crown of Spain before a court of record.

This case was referred to the Attorney-General, who was of opinion "that to oust the consul altogether, as was done in the matter of the estate of Don Ramon Martí y Buguet, and proceed without him, was to proceed without jurisdiction." (See letter to Secretary of War, dated April 26, 1900.) By direction of the Secretary of War on June 8, 1901, the opinion of the Attorney-General was communicated to the military governor of Cuba, with instructions to require the court at Santa Clara, Cuba, to carry out the views set forth in the opinion of the Attorney-General.

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**IN RE ESTATE OF JACOB DUBUQUE, DECEASED, AND THE ADMINISTRATION THEREOF BY THE MILITARY AUTHORITIES OF THE UNITED STATES AT CIENFUEGOS, CUBA.**

[Submitted October 13, 1900. Case No. 1025, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your request for a report on the above-entitled matter, and in compliance therewith have the further honor to report as follows:

The case arises as follows:

On June 26, 1900, one Jacob Dubuque, a citizen of the United States, died at Cienfuegos, Cuba, leaving personal property and real estate valued at about \$30,000. Deceased died intestate. At that time Maj. George L. Brown, Tenth Infantry, U. S. A., was the collector of customs at the port of Cienfuegos. Major Brown, assuming the duties imposed upon United States consuls by Article XIII, paragraph 385, United States Consular Regulations, took possession of said estate and appointed Capt. W. B. Barker, U. S. V., and Henry A. Darling, resident manager of the North American Trust Company, to assist him in making an inventory of the estate. What further progress was made, or action taken, does not appear in the papers filed herein. In taking possession of said estate and proceeding to administer thereon Major Brown considered that he acted within the authority conferred upon him as a collector of customs by circular No. 16, Division of Customs and Insular Affairs, War Department, dated Washington, May 11, 1899.

The matter of this estate was still unsettled on August 1, 1900, when Major Brown was relieved as collector of customs at Cienfuegos by Capt. James Baylies, Tenth Infantry, U. S. A.

From the letter, dated August 16, 1900, written by Captain Baylies, as collector, to Colonel Bliss, as head of the customs service in Cuba (Document 1), it appears that on retiring from the office of collector of customs Major Brown nominally turned over said estate to the new collector, Captain Baylies, but in reality is still managing the affairs thereof.

Captain Baylies doubted his authority to take possession of said

estate and assume the powers of administration thereover under the provisions of said circular No. 16. He referred the question to Colonel Bliss, who adopts the view that said circular No. 16 does not confer the necessary authority. (See 1st end. Doc. 1.) Colonel Bliss advances the matter through military channels, with the following indorsement:

I therefore request the decision of the Secretary of War as to whether collectors of customs in Cuba should or are expected to assume any such functions as those imposed by Article XIII of the Consular Regulations, as undertaken by the collector of customs at Cienfuegos in the case in question.

Colonel Bliss instructed Captain Baylies to perform the duties assumed by Major Brown until the decision of the Secretary of War was received.

Article XIII of the United States Consular Regulations is a reproduction of section 1709 of the Revised Statutes of 1878, as follows:

SEC. 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same with the assistance of two merchants of the United States or, for want of them, of any others at their choice.

Third. To collect the debts due the deceased in the country where he died and pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant, except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings.

Circular No. 16, Division of Customs and Insular Affairs, War Department, is as follows:

CIRCULAR NO. 16,  
Division of Customs and Insular Affairs. }

WAR DEPARTMENT,  
Washington, May 11, 1899.

The following is published for the information and guidance of all concerned:

Collectors of customs appointed by the military authorities of the United States at ports in territory under military government are hereby directed to perform the duties formerly belonging to United States consuls or consular officers in such territory, so far as concerns seamen, vessels, clearances, etc.

\* \* \* \* \*

This order was necessary to enable the territories subject to the military governments to engage in commerce with the United States and other nations.

I understand that actions of said collectors in performing the duties

formerly belonging to consular agents in matters relating to commerce are recognized by the custom-house officers of the United States and of other nations.

It will be noted that said circular authorizes the collectors of customs affected to perform the duties of United States consuls or consular officers "so far as concerns seamen, vessels, clearances, etc.," and therefore limits the authority of such officers to matters involved in the commerce of the country, and does not authorize them to perform the duties of United States consuls in administering upon the estate of a deceased American citizen.

This want of authority may be remedied by another order conferring such authority upon the collectors of customs. A draft for such an order is herewith submitted. This draft follows the language used in section 1709, Revised Statutes of United States, above quoted, with additional requirements regarding reports in regard to the action taken by them.

If such order is issued, it should be communicated to the Treasury Department for its information and files. It would also be well to call the attention of the collectors to the necessity of observing that in such matters they do not act as consular agents of the United States, but as United States collectors of customs, and in signing their names while so acting should add: Acting under authority conferred by Order No. —, War Department, dated —.

Since said collectors are not United States consular agents, they are not required to report to the State Department. The State Department has already refused to receive or consider a report on such matters made by the collector of customs at Iloilo, P. I., basing its refusal on the fact that he was not an actual or acting consular agent of the United States. (Letter from Secretary of State to Secretary of War, January 29, 1900. Estate of Mortimer Cook.)

Some confusion was occasioned in this Department by the refusal of the State Department to receive the report of the collector of customs at Iloilo on the administration of the Cook estate. It was at first understood that the refusal was intended as a denial of the right of the collector to perform the service for the reason that it was now impossible for the United States to have consular agents in that territory. Upon review of the subject and more extended inquiry and investigation, it appears that the refusal was made because the State Department held the view that in such matters the collector did not act as an attaché of the State Department nor as a representative of that Department, but acted as the representative of the War Department, to which he should make report. The collector in that instance signed the report as "Acting United States consular agent," which was erroneous. (See Dept. letter to Colonel Bliss, collector of customs for Cuba, July 20, 1900.)

The laws of the United States do not require United States consular agents to report their proceedings in the administration of estates to the State Department. Such reports are made pursuant to an established practice.

Pursuant to the foregoing report, the Secretary of War issued the following circular:

Circular No. 45. }  
Division of Insular Affairs. }

WAR DEPARTMENT,  
*Washington, December 26, 1900.*

The following is published for the information and guidance of all concerned:

Such persons as may be duly designated for that purpose by the military governor of Cuba are hereby authorized and directed—

First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within territory subject to the military government of Cuba, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same, with the assistance of two merchants of the United States, or, for want of them, of two others at the choice of the person designated to take charge of said estate. Said inventory shall be in triplicate, two of which shall be forwarded through the military channel to the military governor, who shall retain one and forward one to the Secretary of War, the administrator retaining the third.

Third. To collect the debts due the deceased in the country where he died, and to pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts and the costs of administration, the remainder to be retained and preserved until the Secretary of War shall determine what action shall be taken thereon.

Fifth. If the amount realized from the sales provided for in paragraph fourth shall be in excess of the sum necessary to pay the debts of the deceased contracted in that country and the costs of administration, the balance shall be transmitted to the military governor, who shall transmit the same to the Secretary of War for deposit in the Treasury of the United States, there to be held in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings.

Sixth. The military governor of Cuba will designate a person or official in each municipality who, upon receiving information of the decease of an American citizen in said municipality, shall immediately communicate information thereof to the military governor of Cuba, the Secretary of War, and the relatives or friends of the deceased whose address is ascertainable.

This order to be duly proclaimed and enforced in Cuba.

ELIHU ROOT, *Secretary of War.*

**IN THE MATTER OF THE APPLICATION OF SAM WING, A CHINESE MERCHANT, DOMICILED IN PROVIDENCE, R. I., FOR AN ORDER BY THE SECRETARY OF WAR PERMITTING HIM TO ENTER THE PORT OF MANILA, P. I., AND THENCE PROCEED TO ILOILO, TO THERE ENGAGE IN BUSINESS AS A MERCHANT.**

[Submitted, July 13, 1900. Case No. 1802, Division of Insular Affairs, War Department.]

SIR: I have the honor to report upon the above-entitled matter as follows:

This matter was first presented to the Department on June 8, 1900, by Hon. E. W. Roberts, member of Congress, from Massachusetts, who applied orally to the Assistant Secretary for the desired order. The Assistant Secretary referred him to the writer for information as to the course to be pursued. Mr. Congressman Roberts stated, orally, that Challis & Eaton, a well-known and reputable firm, doing business at 146 Franklin street, Boston, Mass., dealers in "Yankee notions," were desirous of introducing their goods into the Philippines. For this purpose the firm had made arrangements to establish in business at Iloilo a Chinaman named Sam Wing, who has been in America since 1875, and for the five years last past a merchant, dealing in Chinese goods, in Providence, R. I. (See letter from Roberts, M. C., received July 13, 1900.) These arrangements contemplate that in the latter part of July, 1900, said Sam Wing will depart from Providence, R. I., go to Montreal, Canada, thence to Vancouver, and from there sail to Hongkong, where he contemplates remaining for a short period, visiting his parents, family, and friends. From Hongkong he desires to go to Manila and from there to Iloilo, to remain and engage in said business.

The interested parties fear that upon arriving at Manila he will not be allowed to enter that port or proceed to Iloilo. It was agreed that prior to action being taken herein by the Secretary, and as a basis for action, it would be necessary to make a showing establishing the identity of the person of said Sam Wing, the fact of his having been in America for years past, that he was a merchant, and his purpose in going to the Philippines. This showing is now made and presented to the Department. It fails to show that Messrs. Challis & Eaton are interested in the venture, but the omission is probably a measure of precaution intended to prevent possible liability in connection with the business.

The military order prohibiting Chinese immigration into the Philippines provides for certain exemptions, as follows:

There will be exempted from the above restrictions the parties named in article 3 of the convention between the United States of America and the Empire of China, published in Supplement to the Revised Statutes of the United States, volume 2,



pages 155-157, to wit: Chinese officials, teachers, students, merchants, or travelers for curiosity or pleasure. The coming of these classes of Chinese will be permitted upon production of a certificate from their Government or the government where they last resided, *viséd* by the diplomatic or consular representative of the United States in the country or port whence they depart, supplemented by such further proof as is required in section 6 of an act of Congress approved July 5. 1884.

The applicant herein, Sam Wing, shows by affidavit that he is a merchant, and has for more than five years last past been domiciled in Providence, R. I. The showing is sufficient to establish the fact of his belonging to an exempted class. But the order requires that the fact be established in a certain way, to wit: "A certificate from their Government or the government where they last resided, *viséd* by the diplomatic or consular representative of the United States in the country or port whence they depart."

The United States Government does not maintain a diplomatic or consular representative in Providence, R. I.

The United States does maintain a consul at Vancouver. I suggested to Mr. Congressman Roberts that he secure for Sam Wing, from the Treasury Department or the State Department, a certificate that he (Wing) is a merchant. This certificate could then be *viséd* by the American consul at Vancouver and would substantially comply with the requirements of the order. The Congressman stated that application had been made to the Treasury Department, and the Department declined to issue such certificate in the absence of a statute authorizing it; that the Treasury had to deal only with the Chinese entering and leaving the ports within the recognized boundaries of the United States; and as to them, the showing was made before a collector of customs, and consists simply in establishing the facts, no certificate being issued. The difficulty seems to arise from the fact that the portion of the order quoted is a literal transcript of a similar provision in the Chinese-exclusion law of the United States, transcribed without provision for meeting the conditions arising from the peculiar relation existing between the Philippines and the United States. Under these circumstances the parties in interest deemed it advisable to apply directly to the Secretary of War for an exercise of his authority to permit this man to enter. This course is certainly direct and adequate.

Attention is directed to the fact that a large proportion of the population of the Philippines speaks the Chinese language, and that a Chinaman who has resided in America since 1875 could, if he desired, disseminate much valuable information among the inhabitants of the islands. A merchant desirous of promoting an American enterprise would naturally desire the restoration of peace in the islands.

So long as Chinese merchants from all other countries are permitted to enter the islands there would seem to be no sufficient reason for excluding one from the United States.

Pursuant to the foregoing report, the Secretary of War issued the following:

MAJ. GEN. ARTHUR MACARTHUR, U. S. V.,

*Commanding Division of the Philippines.*

SIR: You are requested to permit the bearer, Sam Wing, an English-speaking Chinese merchant, late of Providence, R. I., U. S. A., to enter the Philippines at the port of Manila, and thence proceed to Iloilo to engage in business as a merchant; provided the said Sam Wing, as a means of identification, shall present with this letter a certain affidavit subscribed and sworn to by him on July 6, 1900, before Edwin D. McGuinness, notary public, Providence, R. I., and attested by the seal of said notary; also photograph of said Wing, attached to said affidavit; also certificate of Walter N. Butler and Edward Wise, two citizens of Rhode Island, reciting their acquaintance with Sam Wing and the fact that he is a merchant and has been one for more than five years last past; which certificate is also verified by the signature and seal of said Edwin D. McGuinness, notary public.

ELIHU ROOT,  
*Secretary of War.*

**IN THE MATTER OF THE APPLICATION OF THE BOARD OF HARBOR WORKS OF PONCE, P. R., TO THE GOVERNMENT OF THE UNITED STATES, ASKING FOR THE ASSISTANCE OF THE GOVERNMENT OF THE UNITED STATES IN SECURING THE PAYMENT OF A CLAIM ASSERTED BY SAID BOARD OF HARBOR WORKS OF PONCE AGAINST THE GOVERNMENT OF SPAIN FOR THE SUM OF 27,503.06 PESOS.**

[Submitted February 26, 1900. Case No. 1298, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge your request for a report in the matter of the application of the board of harbor works of Ponce, P. R., to the Government of the United States, asking for the assistance of the Government of the United States in securing the payment of a claim asserted by said board of harbor works of Ponce against the Government of Spain for the sum of 27,503.06 pesos.

In compliance with your request I have the honor to report as follows:

Under Spanish dominion in Porto Rico there existed in the city of Ponce what was known as "The board of harbor works of Ponce." Said board was created pursuant to the provisions of article 26 of the harbor law of the island of Porto Rico, which (translated) is as follows:

The Government may provide for the cost of works in harbors by means of special taxes levied in the locality, to be exclusively applied to said works, independently of the general State budget, and organize boards of harbor works charged with the administration and disbursement of funds and the execution of the works, under the supervision and vigilance of the minister of the colonies.

As a means of securing funds to carry on the harbor works the said board was authorized to reclaim lands from the sea and lease or sell said lands. The board also derived an income from the state, the provincial deputation, the municipality, and a local tonnage tax.

The board was a corporation. None of its funds could be used without the consent of the board and only upon a written order signed by the president and secretary. The funds belonging to the board were not converted into the public treasury, but were deposited in a local bank.

On October 2, 1897, the lieutenant-governor of the island, an officer of the Crown of Spain, issued an order requiring the board of harbor works of Ponce to deposit the sum of 27,503.06 pesos with the Spanish collector of customs at Ponce, which order was obeyed.

Shortly after the invasion of Porto Rico by the military forces of the United States, and while the city of Ponce was subject to military occupation by the military forces of the United States, the board of harbor works of Ponce applied to the Spanish ministry of finance at San Juan, P. R., for the return of said 27,503.06 pesos. The board now assert that on September 30, 1898, the Spanish ministry of finance declined to make said restitution for the sole and only reason that the city of Ponce, and consequently its board of harbor works, were under the authority and dependency of the Government of the United States, and for that reason the ministry considered itself not authorized to order the restitution, as such action ought to be made in some other way and through the two Governments, to wit, the United States and Spain.

Upon Porto Rico being evacuated by the forces of Spain, this sum of 27,503.06 pesos was carried away by the Spanish officers. At least it was not returned to the board of harbor works of Ponce.

The board of harbor works of Ponce now solicit the United States Government to enter upon negotiations with the Government of Spain for the purpose of securing the restitution of said amount so exacted from it.

If the facts are as represented by the harbor board, it would seem that their claim is just and well founded and that it is right and proper for the United States to undertake an amicable adjustment of the claim with the Government of Spain, since the United States is charged with protecting the foreign relations of the island of Porto Rico.

Such negotiations are to be conducted by the State Department, and are without the province and jurisdiction of the War Department. The matter, therefore, rests with the discretion of the Secretary of State. I recommend that the papers be forwarded to the Secretary of State for such action as he may deem proper.

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The views set forth in the foregoing report were approved by the Assistant Secretary of War, and on March 6, 1900, the papers were transmitted to the State Department for such action as that Department should consider advisable.

**IN RE APPLICATION TO THE PRESIDENT, BY JUAN B. CALERO,  
TO SET ASIDE AND ANNUL CERTAIN JUDGMENTS RENDERED  
BY THE COURTS OF CUBA PRIOR TO AMERICAN OCCUPATION  
OF THE ISLAND.**

[Submitted June 1, 1900. Case No. 1273, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your request for a report on the above-entitled matter, and in response thereto I have the further honor to report as follows:

It is not necessary to review the litigation to which this application relates further than to state that it consisted of a series of actions, both civil and criminal, which occupied the attention of the courts of Cuba for nine years (1887-1896). The original action was a civil one, and out of that controversy grew a number of others, ancillary or related, in which were involved numerous criminal charges.

The last of the series reached final judgment and the judgment became absolute May 22, 1897, nearly two years prior to American occupation of Cuba.

Pursuant to the purposes of occupation, the government instituted by the United States organized the court known as the supreme court of the island of Cuba, and said court was opened on June 2, 1899. Into this court came the petitioner herein, Juan B. Calero, and instituted an original action attacking the judgments rendered by the Spanish courts in the several suits above referred to, and sought to have the new supreme court revise or annul said judgments on the ground that they were obtained by fraud, perjury, maladministration, official corruption, and divers other high crimes and misdemeanors on the part of his adversaries, the judges of the courts in which the judgments were rendered, and other officials connected with the administration of justice under Spanish dominion.

The supreme court of Cuba dismissed the bill, and thereupon Calero presented this application to the President for the purpose of inducing the President to revise the action of said supreme court of Cuba.

Without discussing whether or not the President, as Chief Magistrate of the United States or as Commander in Chief of the Army, is authorized to review and revise or annul a judicial determination of the present courts of Cuba, it appears sufficient for the determination of this application to direct attention to the fact that the purpose of the proceeding now under consideration is to annul judgments rendered by the Spanish courts of Cuba, with respect to which there was no recourse or right of review under the Spanish law at the time of the exchange of ratifications of the treaty of peace with Spain.

Article XII of that treaty provides as follows:

Judgments rendered in civil suits between private individuals, or in criminal matters, before the date mentioned [exchange of ratifications], and with respect to

which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgment should be carried out.

This treaty is supreme law in Cuba and binding upon the courts and all other governmental agencies subject to the control of the parties to the treaty.

It seems manifest that to grant the prayer of the petition herein is to do violence to this stipulation of the treaty. I therefore report that the application should be denied.

This application has been heretofore referred to Major-General Wood, military governor of Cuba, and by him referred to his secretary of justice, who made an exhaustive examination of the merits of the case and an elaborate report thereon, in which he finds against the applicant. Major-General Wood concurs in said report. For the reasons already set forth, I do not consider such examination essential, and therefore the merits of the case are not reported on.

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The views expressed in the foregoing report were approved by the Secretary of War and on June 5, 1900, the military governor of Cuba was advised that "the application was denied."

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**REPORT ON THE APPLICATION TO THE SECRETARY OF WAR,  
MADE BY ANTONIO DIAZ HERRERA, AN INHABITANT OF CUBA,  
REQUESTING THE SECRETARY OF WAR TO ANNUL THE FINAL  
DECREE OF THE JUDGE OF SAN ANTONIO DE LOS BAÑOS MADE  
MAY 25, 1897.**

[Submitted June 1, 1900.]

SIR: I have the honor to acknowledge the receipt of the papers in the above-entitled matter with a request for a report thereon. In compliance with said request, I have the further honor to report as follows:

It appears that a woman named Teofila Ullva Machin, a resident of Cuba, gave birth to four children. The mother was married to Augustin Ramirez. The records for the years, 1876, 1878, 1881, and 1888 show that said children were baptized as the legitimate children of said Augustin Ramirez and said Teofila Ullva Machin, born in lawful wedlock. Said Ramirez (the husband) is now dead, but the date of his death is not set forth in the papers submitted.

It further appears that some time prior to May 25, 1897 (date not appearing herein), the mother of said children instituted legal proceedings to have said children declared by the court to be the natural children of one Augustin Diaz Herrera, a brother of this applicant.

On May 25, 1897, the judge of San Antonio de los Baños entered a decree in said proceedings. A copy of said decree has not been filed herein.

The application herein with reference to said decree recites:

And which four minors by *final* sentence of the 25th of May, 1897, \* \* \* are \* \* \* declared to be the children of Teofila Ullva Machin and *unknown* fathers.

When this application was received by the Secretary it was forwarded to Major-General Wood, military governor, etc., "for remark." He referred it to the audiencia of Habana for report. From the report made by the audiencia the following is quoted:

The declaration that the children of the Ullva were natural children of *Díaz Herrera* was made by final decree of the judge of San Antonio de los Baños on the 25th of May, 1897.

I accept the report of the audiencia as correctly stating the finding of fact contained in the decree of May 25, 1897.

Both the application and the report of the audiencia thereon declare that said decree was final.

In regard to the proceedings had by the judge of San Antonio de los Baños, the report of the audiencia of Habana recites:

All the antecedents that prompted the above resolutions of the judge were recorded in the case, and in none of these can any misrepresentation of the rulings be noticed.

I take this to mean that the proceedings had were due and regular. No attack is made on the jurisdiction of the court which rendered the decree of May 25, 1897.

I am of the opinion that the investigation of the Secretary should stop at this point. It is true that several actions have been instituted in the courts of Cuba seeking to set aside said decree. Some of said actions were started prior to the military occupation of Cuba by the United States and some of them afterwards. All of them failed and the decree stands. Being a final decree in a civil suit rendered prior to the exchange of ratifications of the late treaty with Spain, it is protected by the provisions of article 12 of said treaty, which are as follows:

Judgments rendered either in civil suits between private individuals, or in criminal matters, before the date mentioned, and with respect to which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out.

The legal proceedings instituted in regard to this matter at various times after the decree of May 25, 1897, was entered, were directed against that decree or the things rendered *res adjudicata* by that decree. If the application is considered as relating to the judicial proceedings had after the decree of May 25, 1897, or more especially those entertained by the court after American occupation, and whether or not such proceedings were original, or ancillary to the first action, the fact remains that said actions in court and this proceeding before the

secretary are each and all assaults upon a judgment of a court conceded to be final at the date the treaty became operative as to the rights of individuals.

The purpose of this application will be better understood when it is stated that Augustin Diaz Herrera is now dead; and that under Spanish law natural children are entitled to participate in the estate of their father when such relationship is judicially declared to exist. The applicant herein is a brother and one of the heirs of the deceased. Having failed in various suits before the tribunals of Cuba to exclude these children from participating in his brother's estate, he files this application.

The casual reader of the application is liable to receive the impression that this proceeding is on behalf of the children and intended to relieve them from the odium of illegitimacy. Indeed, the opening paragraph denounces the decision of the court because it "declared that the four minor children *of my said* brother \* \* \* are natural children." The real purpose of the applicant is disclosed by the closing paragraph of the application, wherein he says:

The false hereditary right of the minors being sanctioned by the judicial authorities, \* \* \* a fraud will be perpetrated with regard to the property of my brother to the prejudice of his legitimate heirs.

It will be noticed that the applicant complains solely of the finding made by the court on a question of *fact*. The presumption is in favor of the finding of the court. Against this presumption there is presented only the assertion of the defeated litigant that the finding is erroneous, which statement is not supported even by the oath of the applicant. However broad the authority of the Secretary may be in dealing with the courts of Cuba, the showing made herein is not sufficient to justify its exercise.

I therefore report that the application should be denied.

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The Secretary of War approved the views expressed in the foregoing report, and the papers were returned indorsed as follows:

WAR DEPARTMENT, DIVISION OF INSULAR AFFAIRS,

June 5, 1900.

Respectfully returned to the military governor of Cuba with the information that the application is denied.

By order of the Secretary of War:

CLARENCE R. EDWARDS,  
*Acting Assistant Adjutant-General.*

**IN THE MATTER OF THE APPLICATION OF FRANK H. GRISWOLD, CHARLES BIGELOW, HERBERT S. GRISWOLD, AND JOSEPH J. McNALLY FOR ARTICLES OF INCORPORATION CREATING A CORPORATION UNDER AND BY VIRTUE OF THE LAWS OF PORTO RICO.<sup>a</sup>**

[Submitted June 14, 1899. Case No. 443, Division of Insular Affairs, War Department.]

**SYNOPSIS.**

1. A corporation is a creature of the law. In the absence of a law providing for its incorporation, a corporation can not be created.
2. The royal decree of Spain dated August 16, 1878, was the law under which corporations were created in Porto Rico at the time said island was ceded to the United States. Said decree does not confer the right to incorporate upon the public to be exercised by such persons as desire to form a corporation. Under the Spanish monarchy the people possess only such rights as are conferred upon them by the Crown. The authority to grant the right to incorporate was retained by the Crown of Spain and exercised as a prerogative. By said decree such prerogative was delegated to the governors-general of the Spanish dependencies.
3. The Federal Government of the United States is not authorized by the Constitution to acquire or exercise the prerogatives of the Crown of Spain. A like incompetency exists as to the officers of the United States now in charge of the civil affairs in Porto Rico.
4. When the Spanish sovereign withdrew from Porto Rico and ceded the island to the United States, such of his sovereign rights as were not inimical to a republic passed to the sovereign people of the United States, where they will remain until that sovereign disposes of them by expressing its will in regard thereto by laws duly enacted.
5. When Spanish sovereignty was withdrawn from Porto Rico, the Spanish governor-general, and all other officers of the Crown of Spain whose authority consisted in the exercise of royal prerogatives delegated to them, ceased to exercise such authority. Said delegated prerogatives did not pass to the officers of the United States now in charge of the civil affairs of said island.
6. Said royal decree of August 16, 1878, is now inoperative in Porto Rico.
7. There is no Federal statute of the United States authorizing the formation of a corporation with domicile in Porto Rico.

Said proposed corporation is to have a capital stock of \$200,000, divided into 2,000 shares of \$100 each. Said corporation is to be known as the Porto Rico Brewing Company, and to be authorized, as stated in its proposed articles of incorporation, to engage in the business of—

ART. 6. \* \* \* Manufacturing any and all kinds of malt and spirituous liquors from grain and other products, and the utilizing of any and all material that may be purchased for the purpose of manufacturing said malt and spirituous liquors, the manufacture of ice, the installment of an electric plant and the right to manufacture and

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<sup>a</sup>If such corporation can not be created under the laws of Porto Rico as now existing, then said applicants desire to become incorporated as a Porto Rico corporation under and by virtue of the Federal authority of the United States.



produce electric fluid, the establishment and maintenance of cold-storage warerooms, the right to purchase and traffic in cold-storage products, the right to trade and traffic in all products such as it has a right to manufacture, and the right to engage in any lawful business that may be necessary or incidental to the exercise of the above-mentioned corporate privileges and purpose; and when such incidental business is conducted by the corporation it will not be limited to the transacting of such business in a mere incidental manner, but may obtain the best results therefrom.

ART. 7. That said body corporate shall have the right of perpetual succession, a common seal, the right to make by-laws and regulations not inconsistent with the laws of the land, the right to sue and be sued by their corporate name "Porto Rico Brewing Company," and the right to exercise its corporate privileges under protection of its charter, upon paying all general and universal taxes and without paying any special tax assessed against it or its property by special law or ordinance.

It will be noticed that these applicants seek to create a corporation and at the same time endow said corporation with special rights, privileges, and exemptions. Under the Spanish régime such benefits were sometimes bestowed upon both persons and corporations, but they were secured by separate and different procedures.

Among other special privileges sought to be secured by these proposed articles of incorporation is one to be allowed to conduct the business of manufacturing and selling malt, spirituous, and vinous liquors "without paying any special tax assessed against it or its property." (See art. 7.)

Eventually Porto Rico will be subject to internal-revenue laws; its municipalities will possess the right in some degree to impose municipal license tax and other regulations on the sale of such liquors. They will also have authority to pave the streets, construct sanitary and storm-water sewers, and make other public improvements which confer special value and benefits on particular properties and justify the levy of special taxes on the property so benefited.

Another privilege sought is that "its shareholders shall be liable only for the par value of their stock. (See art. 9.)

Ordinarily stockholders in a corporation are liable for the unpaid portion of the par value of the stock they own, and are subject to an additional liability of 100 per cent on said stock.

This Department, while temporarily engaged in administering the government of civil affairs in Porto Rico, ought not to embarrass the future permanent government of the island by granting concessions of this character, if it were admitted that the Department had the legal right so to do.

The proposed corporation can not be created under and by virtue of the laws as they existed in the island of Porto Rico under Spanish dominion, for the reason that the office and the official upon whom the Spanish law conferred the authority to create such corporations have ceased to possess the right to exercise authority in Porto Rico.

The "Regulations for the formation of corporations in the colonies," established by royal decree of the Crown of Spain, dated August 16, 1878, provide as follows:

CHAPTER I, ART. 2. These corporations shall be constituted by means of public instruments, which must be approved, as well as their regulations, by the competent authority and in the manner hereafter stated.

That manner is set forth in Chapter II of said regulations, a copy of which is hereto attached.

For corporations of the character desired by these applicants said law requires that the persons desiring to create the corporation first secure the permission of the governor-general to take the initial steps—that is, the governor-general must authorize the preliminary undertaking (chap. 2, art. 18), which undertaking consists of securing subscription for at least one-half of the capital stock. (Chap. 2, art. 20.) This stock being subscribed, the subscribers meet, and by resolution agree to the articles of incorporation and the by-laws. Thereupon the matter is again presented to the governor-general by submitting for his approval the original of the articles of incorporation and a copy of the by-laws and the resolution of the meeting at which they shall have been adopted, and also a sworn statement of the stock subscribed. (Chap. 2, art. 20.) The governor-general then investigates the entire matter and approves or disapproves of the proposed incorporation. (Chap. 2, art. 21.)

A corporation is the creature of a law. (Head *v.* Providence Insurance Company, 2 Cranch, U. S., 127.) In attempting to create a corporation pursuant to the provisions of an existing law the procedure required by said law must be strictly adhered to.

By the law of the Spanish dependencies the tribunal vested with the power of granting the right to incorporate, as desired herein, was the governor-general. Under the government now in charge of civil affairs in Porto Rico there is no such office or official. The officer in the United States Army who is now acting as governor of said island is an official of the United States and derives his authority from this Government and not from the Crown of Spain.

In *Munford v. Wardwell* (6 Wall., 423, 435) the United States Supreme Court say:

Mexican rule came to an end in that department (California) on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. Municipal authority also was exercised for a time by subordinate officers appointed by our military commanders. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the department. By virtue of that supposed authority Gen. S. N. Kearney, March 10, 1847, as military governor of the territory, granted to the town of San Francisco all the right, title, and interest of the United States to the beach and water lots on the east front of the town included between certain described points, excepting such lots as might be selected for Government

use. \* \* \* But the power to grant lands or confirm titles was never vested in our military governors, and it follows as a necessary consequence that the grant, as originally made, was void and of no effect. Nothing passed to the town by the grant.

The power to grant the right to incorporate or to create a corporation was never vested in our military governors. The powers of the present governor of Porto Rico are further limited by the fact that since peace is declared he no longer exercises the rights of a belligerent in actual war..

To definitely determine the exact law of many subjects in Porto Rico under Spanish sovereignty will require extensive review and comparison of the royal decrees promulgated for said island. When this Department is called upon to enforce a Spanish law in Porto Rico, the first question is, What are the provisions of said law? That being determined, the next inquiry is, Are such provisions in harmony with the theory and character of the United States Government? If found to be inimical to our form of government, either in the spirit of the law or the instruments by which the law is carried into effect, this Department declines to enforce said law for the purpose of creating rights not theretofore in existence. Whether the existing government in Porto Rico is considered a military or a civil government, the result is the same. Either is an instrument of the United States and must be utilized in accord with the home Government or sovereignty upon which it depends.

Under the Spanish monarchy the people exercise only such rights as the Government confers upon them. Under the Republic of the United States the Government exercises only such rights as the people confer upon it. When Porto Rico was ceded to the United States our Federal Government did not succeed to the prerogatives over said island inherent in the Crown of Spain under the monarchy. Our Federal Government has never been authorized to receive or in any way secure said prerogatives by transfer from a monarch or otherwise, and much less is it authorized to exercise such prerogatives. *Pollard's Lessee v. Hagan* (How., U. S. (2), 212, 235):

Since our Government can not exercise such prerogatives, it follows that our Government's officers can not exercise them. Take the matter of creating a corporation in a Spanish dependency as an example. The power to confer the right is vested in the Crown of Spain. The exercise of that power is a prerogative of the Crown. The royal decree of August 16, 1878, simply delegates this exercise of power, or prerogative, to the governors-general of the several dependencies, and provides the manner of applying to said officers for the exercise of that prerogative by them. The grant of power is to the *officer*, not to the persons applying for the incorporation. The officer may grant the privilege or not, as he sees fit. The applicants do not possess the *right* to incor-

porate, nor to take the preliminary steps thereto, until it is given to them by the governor-general. It can not be admitted that this prerogative passed to the officer of the United States who is now acting as the governor of said island. He is not the delegate of the Crown of Spain.

This application does not call for the exercise of a right conferred upon the people, or such persons as desire to form a corporation. It calls for the exercise of a power heretofore possessed by the Crown of Spain and by the Crown delegated to a Crown officer. When the sovereignty of Spain withdrew from the island, the royal decree of August 16, 1878, became null and void. Therefore there is no existing law in Porto Rico under which a corporation may be organized. Persons desiring to conduct business in said island by means of a corporation must organize such corporation elsewhere.

It appears from the documents filed herein that this application has been presented to the council of secretaries for the Department of Porto Rico, and that body has given its consent to the incorporation under the articles of incorporation proposed. The same want of authority in the council of secretaries and the absence of a law under which to proceed, prevent that body from giving legal effect to the act of incorporation, as prevent the military governor and this Department.

It therefore appears that applicants can not form a corporation of the kind and character set forth in their application under the existing laws of Porto Rico.

The suggestion that said applicants desire to form a corporation in Porto Rico under some general law of the United States need not be discussed. There are no Federal laws of the United States under which such a corporation could be formed, were it admitted that said laws, if existing, would be in force in Porto Rico.

As at present advised, this Department considers said royal decree of August 16, 1878, as being the law of incorporation in Porto Rico at the date of cession to the United States. If the provisions of that law have been modified so as to confer the power to grant incorporation upon some officer or body which did not become *functus officio* upon the withdrawal of Spanish sovereignty, a different question would be presented.

Many persons seem to entertain the belief that special rights, privileges, and exemptions in the territory ceded by Spain to the United States may be conferred by this Department, or by the various officers now in charge of civil affairs in said territory, by the exercise of mere volition on the part of said officers or by arbitrary exercise of power.

This misconception seems to be founded on the widespread, but not properly understood, idea that said territory is conquered territory and that the will of the conqueror is the law of the conquered. Without stopping to discuss the limitations and modifications of this

doctrine, imposed by modern custom, attention is directed to the fact that the conqueror in this instance is the sovereign people of the United States. That sovereign makes known its will by laws duly enacted by the legislative branch of its Government, therefore it is that our Government is one of laws. The military officers of our Government are authorized to act in military affairs in time of war upon their own judgment and discretion, subject to the control of the superior authorities. Their sovereign deems that essential to the proper conduct of a war. But as regards Porto Rico, the war is over. Its purposes have been accomplished, the treaty duly exchanged, and peace declared, the United States military officers in Porto Rico are no longer engaged in the conduct of a war. They are now engaged in the peaceful pursuit of conducting the affairs of a civil government in time of peace. The rule for their actions must be found in the laws—Spanish laws, if they are in force and effect in the territory; United States laws, if they are in force therein—and such rules, regulations, orders, and instructions as their home Government is authorized to make, either by virtue of its laws and principles of government or by the general law of nations.

By none of these is the authority given to the President, as Commander in Chief of the military forces of the United States, to create mercantile corporations in Porto Rico.

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The final action of the War Department on this application was as set forth in the following letter:

WAR DEPARTMENT,  
*Washington, June 15, 1899.*

SIR: Referring to an application made February 1 by Messrs. Frank H. Griswold and others to incorporate the "Porto Rico Brewing Company," in the island of Porto Rico, I now have the honor to inform you that there exists in the War Department no authority for granting the formation of such a corporation with a domicile in Porto Rico.

I beg to inclose herewith a syllabus of the opinion of the law officer of the Division of Customs and Insular Affairs upon this subject.

Very respectfully,

G. D. MEIKLEJOHN,  
*Acting Secretary of War.*

Mr. JOSEPH J. McNALLY.

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**IN THE MATTER OF THE APPLICATION OF RAMON VALDEZ FOR  
A REVOCABLE LICENSE TO OCCUPY AND UTILIZE THE WATER  
POWER OF LA PLATA RIVER IN THE DISTRICT OF COMERIO,  
PORTO RICO.**

[Submitted August 24, 1899. Case No. 583, Division of Insular Affairs, War Department.]

The applicant herein, Ramon Valdez, instituted proceedings, while Porto Rico was under Spanish dominion, to secure a permanent franchise for the use of the water power at Comerio Falls, in La Plata River, Porto Rico. Said proceedings were in pursuance of provisions of

Spanish law at that time in force in that locality, but had not progressed sufficiently to confer a perfect title or completed franchise on Valdez at the time Porto Rico was ceded to the United States. Valdez applied to the government now in charge of the civil affairs of Porto Rico, for recognition and confirmation of his rights created by said proceedings. The application was forwarded to this Department by Major-General Henry, indorsed:

This applicant has complied with all the requirements of the law here. It is recommended that his concession be granted in accordance with law, with strict conditions that he shall begin and complete the work without delay.

It appears by the reports of Maj. A. C. Sharpe, acting judge-advocate, F. L. Hills, director of public works, and F. del Valle Atites, secretary of the interior for Porto Rico, that all the requirements of the Spanish law have been complied with in said matter, and that no legal rights of private persons would be violated if the exercise of the concession were permitted.

It also appears that Valdez owned or had leased the land constituting the banks on either side of the river at this point.

The view taken by the Division of Customs and Insular Affairs of this Department was that inasmuch as the beds of streams in Spanish territory belonged to the Crown, and the Crown or public property in Porto Rico had been transferred to the United States, it followed that if the desired portion of the Plata River bed belonged to the public domain of Spain at the time of the transfer by treaty, the concession could not be granted by this Department, but this Division considered that the filing of said application, pursuant to existing law, segregated the point in the river bed covered by the application and created a property right thereto, in Valdez, which the United States is bound to respect. (*Bryan v. Kennett*, 113 U. S., 179, 192.)

Regarding the title secured by the United States to public lands in California by the cession from Mexico, the United States Supreme Court say:

It took the lands subject to all the equitable rights of private property therein which existed at the time of the transfer. Claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. (*Newhall v. Sanger*, 92 U. S., 764.)

Conceiving the rule to be the same in the instance of Porto Rico, the Insular Division considered it proper to pursue a course in harmony with the rule laid down by Halleck's International Law:

And as the law of nations and the usage of the civilized world impose upon the new sovereignty the duty to maintain and protect the property of the conquered inhabitants, it is bound to take the necessary steps to clothe equities with a legal title, so as to bring them within the scope of legal remedies under its own laws. \* \* \* A delay in applying such remedies is often equivalent to a denial of justice or a confiscation of private property, and is therefore a breach of public law and a violation of national faith. (3d ed., chap. 34, sec. 26.)

This Department considered that Valdez had acted in good faith in this matter, and had properly proceeded to acquire this franchise pursuant to the provisions of the Spanish law, and that such proceedings were of force and effect up to the time the sovereignty of Spain and the public property in Porto Rico were ceded to the United States. (Halleck's Int. Law, 3d ed., chap. 33, secs. 23, 24, and 25.)

The United States Supreme Court say:

In harmony with the rules on international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law would enforce before should be enforceable after the cession. (Ely's Administrator v. United States, 171 U. S., 220, 223.)

The expression "rights and titles" was understood to mean equitable rights as well as legal titles.

The application was referred to the honorable Attorney-General, who decided adversely, holding that—

If in the granting of a right or privilege the sovereign has retained an iota of authority which may affect its untrammelled exercise and enjoyment, the right is not of the nature of an absolute one, but wholly of an inchoate and imperfect quality. As to inchoate, imperfect, incomplete, and equitable rights the succeeding sovereign is the absolute dictator. They can not be exercised against his sovereignty, but only by his grace, and its affirmative exercise is necessary to the validity of the concession. (See letter of July 27, 1899, 22 Op. 549.)

Accepting the Attorney-General's determination as conclusive, it appears that the United States is the proprietor of the bed of the Plata River at this point, free and clear of incumbrance, as to Valdez, since the rights he asserts can only be exercised by the grace of the new sovereign.

Thereupon Valdez applies to this Department for a revocable license permitting him to utilize said water for the purpose of operating a plant for producing electrical power.

The transfer of title from Spain to the United States is complete. Such title as Spain possessed and could convey to a republic is now vested in the United States. The property of the United States in Porto Rico is in the custody and charge of the War Department.

In letter to the Secretary of War dated July 26, 1899, *in re* application of Frederick W. Weeks for permission to construct and maintain a wharf on the submerged soil and in the harbor waters at Ponce, Porto Rico, the Attorney-General determined that the Secretary of War has authority to grant a revocable license to make temporary use of portions of the public domain in Porto Rico, limiting the time the license continues in effect to "the period of military occupation" of Porto Rico. The Attorney-General advises (as a matter of policy) "that no license \* \* \* should be granted except to some person owning the abutting lands," etc. (22 Op. 545-546.)

Valdez owns the land constituting one bank of the river at the point where said water power is located, and has secured the assent of the proprietor of the other bank to his use of said water power in the way contemplated in this application and the construction within the banks of said river of such structures as may be necessary for such use.

The difference between the license desired herein and that determined to be permissible in the Weeks case is that the Weeks application was for rights in and to soil beneath navigable waters, while this application seeks to secure rights in and to soil beneath waters not navigable.

The course or policy pursued by Congress as to soil submerged by non-navigable waters in territory acquired from foreign nations, differs from that adopted as to soil submerged by navigable waters. For many years it was maintained that the United States held the land submerged by navigable waters in trust for the future States which should be erected in the territory, and that Congress could not dispose of said land. The final word of the Supreme Court in that matter is found in *Shively v. Bowlby* (152 U. S., 1, 58), wherein the court, after an exhaustive review of the questions involved, adjudged as follows:

The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark or tide waters, but they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the States, respectively, when organized and admitted into the Union.

The rule or policy adopted as to land submerged by non-navigable waters is different. By general law Congress has provided:

All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways, and in all cases where the opposite banks of any stream not navigable belong to different persons the stream and the bed thereof shall become common to both. (Sec. 2476, U. S. Rev. Stats.)

As to the streams in the territory acquired by the Louisiana purchase Congress provided that:

All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways. (See sec. 5251, U. S. Rev. Stats.)

It will be noticed that Congress left the rights of proprietors adjacent to nonnavigable streams to be determined according to the rule of the common law.

The Supreme Court of the United States say:

By the law of England, Scotland, and Ireland the owners of the banks *prima facie* own the beds of all fresh-water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream. (*Shively v. Bowlby*, 152 U. S., 1, 31.)



This rule of the common law has been modified as to navigable streams by legislative enactments in several States of the Union, but as to non-navigable streams the uniform rule throughout the States is:

Fresh-water streams which are not a common passage are private property, and the title to the bed of the river *ad filum aque* is in the riparian proprietors. \* \* \* If the banks on both sides of the river belong to the same person, he owns the entire river bed according to the extent of his lands in length. (Gould on Waters, 2d ed., chap. 3, sec. 46.)

It seems clear that Congress proceed upon the hypothesis that the common law is one of the institutions of this country, and that upon the acquisition of territory by the United States from a foreign nation the rule of the common law as to submerged soil attaches thereto and controls the rights of the new sovereign and the adjacent private owner.

As the United States Supreme Court say:

Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government and not according to those of the government ceding it. (Pallard's Lessee v. Hagan, 3 How., 212, 215; Vat., Laws of Nations, b. 1, c. 19, s. 210, 244, 250, and b. 2, c. 7, s. 80.)

Under this view of the matter, the privilege which Valdez seeks to exercise would be appurtenant to the rights he now possesses.

In support of the authority of the Secretary of War to grant the license requested, in addition to the opinion of the Attorney-General on the Weeks application, attention is directed to the provisions of the act approved July 28, 1892, as follows:

That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing laws, etc. (U. S. Stat. L., vol. 27, chap. 316, p. 321.)

If the bed of the Plata River is now the property of the United States, it is subject to the authority conferred by the foregoing law.

A question arises as to the advisability of issuing this license independent of that of authority to do so.

In response to inquiry, General Davis, governor of the island, cabled as follows:

The right to utilize water power at Comerio is now being litigated in local supreme court. I recommend adverse action by Department until question of title is settled. Temporary license would be useless, for to utilize the power would cost a large sum in dam head works and turbines which no temporary use would justify. I will soon forward a large number of papers of rival claimant.

If the litigation referred to relates to rights derived from or dependent upon the concession or proceeding relating thereto, such litigation is rendered unavailing (in this Department) by the determination of the Attorney-General that said proceedings did not create substantial rights.

If said litigation relates to the requirements of the Spanish law of concessions, its pendency is inconsequential, as the change of sovereignty revoked all laws authorizing the alienation of the public domain. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject. (*Moore v. Steinbach*, 127 U. S., 70, 81; *United States v. Vallejo*, 1 Black, 541; *Ely's Admr. v. United States*, 171 U. S., 220, 230.)

If the litigation relates to the ownership of the land adjacent to or constituting the banks of said river at said point, and the rights appurtenant to said ownership, the granting of the revocable license asked for will not affect the legal rights of the parties, and by appropriate provisions in the license the rights of all may be protected.

It is probably true that securing the desired license will afford Valdez a substantial advantage in the final determination of the right to use this water power. In the United States priority of possession, or the first use of water for mining, agricultural, manufacturing, or other purposes, creates rights of substantial character recognized by the courts and Congress. (*Broder v. Water Co.*, 101 U. S., 276; *Sparrow v. Strong*, 3 Wall., 97; *Basey v. Gallagher*, 20 Wall., 670; *Atchison v. Peterson*, 20 Wall., 507. See also sec. 2339, U. S. Rev. Stats., and the act of February 27, 1865, 13 Stat. L., 441.)

The doctrine so recognized arises from the established policy of this nation to encourage and promote the development of the natural resources and advantages of this country, and is equally applicable to conditions in Porto Rico.

Conceding that an advantage will be obtained by securing the rights of prior occupancy, no reason appears to exist why such advantage should be denied to this applicant. He shows to this Department that he has been a pioneer in developing Porto Rico, and desires to immediately utilize this water power to extend and promote the electric railway and electric-lighting plant owned and operated by him for several years. He is shown to be a business man of means and standing, who desires to invest his capital in the development of the community in which he has for years resided.

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A revocable license was issued, pursuant to the foregoing recommendation, but was subsequently revoked, and the matter was thereafter disposed of by the civil government of Porto Rico created by Congressional enactment.

**MEMORANDUM RESPECTING THE EXERCISE OF THE POWER TO  
PARDON UNDER THE MILITARY GOVERNMENT MAINTAINED  
IN NEW MEXICO.**

ALSO

**THE ORDERS OF THE MILITARY GOVERNMENT OF CUBA RELAT-  
ING TO THE EXERCISE OF THE POWER TO PARDON UNDER  
THAT GOVERNMENT.**

[Submitted July 25, 1901.]

The conquest of New Mexico by the military forces of the United States was accomplished by the campaign of 1846. In compliance with instructions given by the President, the officer in command, General Kearny, organized a civil government for the occupied territory and filled the executive and judicial offices by appointment. In December, 1846, the native inhabitants organized a conspiracy to overthrow the United States authority in New Mexico. On the night of January 15, 1847, the insurgents began hostilities and succeeded in killing the governor and a number of others, officials and citizens of the United States. The insurrection became general and the declared purpose was to kill all the Americans and those Mexicans who had accepted office under the American Government. The insurrection was suppressed by the military forces of the United States and a number of the insurgents captured, and by the latter part of 1847 comparative safety was secured and maintained by stationing troops at various points. Of the insurgent prisoners, some were tried by court-martial, sentenced to death, and executed. The others were turned over to the civil authorities of the military government for trial in the civil courts. A grand jury indicted four of them for the offense of treason against the United States. One was tried by a jury and convicted. The prisoner challenged the jurisdiction of the civil court and assailed the indictment on the ground that he was not a citizen of the United States nor bound to yield allegiance to that Government. Strong pressure was brought to bear in his behalf, and the district attorney, Mr. Blair, referred the matter to Washington for instruction. He addressed his communication to Hon. John Y. Mason, then Attorney-General of the United States. Said letter was as follows:

SANTA FE, *April 1, 1847.*

SIR: YOU will doubtless have received, before this reaches you, the particulars of the late insurrection in the northern district of this Territory, through the public prints.

Of the prisoners taken in the suppression of that rebellion one of the leaders was executed under sentence of a court-martial. The remainder were turned over for trial to the civil authorities on the charge of treason against the United States.

At a term of the United States district court for this Territory, held at this capital in March last, four conspicuous persons in the late rebellion were indicted for treason by the grand jury, three put upon their trial, one of whom was found guilty and

sentenced by the court, one discharged under a *nolle prosequi*, and two obtained continuance to the adjourned term of the court in May next. Some twenty-five prisoners were discharged, the grand jury not finding sufficient evidence to indict them for treason.

About fifty prisoners are confined at Taos, in the northern district, awaiting trial at the term of the court commencing on the 5th instant, at which time both the circuit court for that county and the United States district court will be in session.

A number of the prisoners can be identified as active participants in the massacre of the late Governor Bent and others. These it is the intention to prosecute before the circuit court, but many others, who were active in the planning and exciting the late insurrection, I feel it my duty to prosecute for treason against the United States.

I have taken the liberty to lay these particulars before you in order that I may understandingly ask your counsel and advice, which I have had a great desire to obtain before entering upon these prosecutions, but the want of opportunity to communicate with you did not permit it.

You are doubtless fully aware of the manner and form in which Brigadier-General Kearny declared New Mexico a Territory of the United States and its inhabitants citizens subject to her laws and liable to penalty for their infraction in like manner as citizens of any other Territory of the United States. By the authority in him vested he established a civil government, a superior court, with jurisdiction as a United States district court. In this last-named court I, by appointment, act as United States district attorney, and have felt it my duty to prosecute all acts of treason committed by the inhabitants of this Territory, holding them responsible for all their acts as citizens of the United States.

In nearly all the cases tried the counsel for the defense have entered pleas to the jurisdiction of the court, which the court overruled, and in the case of Trujillo, who was convicted, the defense plead the jurisdiction of the court before the jury, declaring it to be unconstitutional to try any native inhabitant of New Mexico for the crime of treason against the Government of the United States until by actual treaty with Mexico he became a citizen. The court ruled out any consideration of this point by the jury, leaving it only the evidence and the facts upon which to make its verdict. Considering how it was constituted, the court was bound by its oath to view all the inhabitants of New Mexico as citizens of the United States and to execute the laws in regard to them as such, leaving the responsibility of the question of its constitutionality to fall back upon the power which constituted it.

I am anxious to receive your counsel and advice at the earliest possible moment in regard to all the matters above referred to.

Mails for this place will no doubt leave Fort Leavenworth regularly hereafter, and I trust you will oblige me by replying to this by the first opportunity.

Very respectfully, your obedient servant,

FRANK P. BLAIR.

HON. JOHN Y. MASON,

*Attorney-General of the United States.*

The Attorney-General referred the matter to the War Department. Hon. W. L. Marcy was then Secretary of War, and he addressed his communications relating to the matter to Colonel Sterling Price, in command of the United States forces in New Mexico. From these communications the following passages are quoted:

WAR DEPARTMENT, June 11, 1847.

SIR:

\* \* \* \* \*

I am not aware that the President has yet received the petition for the pardon of Antonio Maria Trujillo, but I have conversed with him and am now enabled to present his views on that subject.

The temporary civil government in New Mexico results from the conquest of the country. It does not derive its existence directly from the laws of Congress or the Constitution of the United States, and the President can not, in any other character than that of Commander in Chief, exercise any control over it. It was first established in New Mexico by the officer at the head of the military force sent to conquer that country, under general instructions contained in the communication from this Department of the 3d of June, 1846. Beyond such general instructions the President has declined to interfere with the management of the civil affairs of this Territory. The powers and authority possessed by General Kearny when in New Mexico were devolved on you as the senior military officer on his departure from that country. They are ample in relation to all matters presented to the consideration of the President in the communication of the acting governor, Vigil, dated 23d March last, and to you, as the senior military officer, or to whosoever is such officer, he will leave such matters without positive or special direction. Your better knowledge of all the facts and circumstances will doubtless enable you to take a wise and prudent course in regard to them.

The insurrection in that department called for energy of action and severe treatment of the guilty. It was but justice that the offenders should be punished; the safety of our troops and the security of our possessions required it. Beyond what was necessary to these ends, it is presumed you have not gone; and the President sincerely hopes that the life of Antonio Maria Trujillo may be spared, without disregarding them. With this suggestion he leaves the case of Trujillo to your disposal, as he does all others yet under consideration.

\* \* \* \* \*

Very respectfully, your obedient servant,

W. L. MARCY,  
*Secretary of War.*

Col. STERLING PRICE,

*Or Officer Commanding United States Forces at Santa Fe, N. Mex.*

WAR DEPARTMENT,  
*Washington, June 26, 1847.*

SIR:

\* \* \* \* \*

The foundation of the civil government in New Mexico is not derived directly from the laws and Constitution of the United States, but rests upon the rights acquired by conquest. I call your particular attention to the fourth paragraph of my letter of the 11th of June, as containing the principles on which the temporary government at New Mexico does or should rest. The territory conquered by our arms does not become, by the mere act of conquest, a permanent part of the United States; and the inhabitants of such territory are not, to the full extent of the term, citizens of the United States. It is beyond dispute that, on the establishment of a temporary civil government in a conquered country, the inhabitants owe obedience to it, and are bound by the laws which may be adopted. They may be tried and punished for offenses. Those in New Mexico, who, in the late insurrection, were guilty of murder, or instigated others to that crime, were liable to be punished for these acts, either by the civil or military authority; but it is not the proper use of legal terms to say that their offense was treason committed against the United States; for to the Government of the United States, as the Government under our Constitution, it would not be correct to say that they owed allegiance. It appears by the letter of Mr. Blair, to which I have referred, that those engaged in the insurrection have been proceeded against as traitors against the United States. In this respect I think there was error, so far as relates to the designation of the offense. Their offense was against the temporary civil government of New Mexico and the laws provided for it, which that government had the right and, indeed, was bound to see executed.

On two former occasions I have addressed you in regard to Trujillo, who has been convicted of participating in the insurrection, and the execution of his sentence suspended, and made known the decided wishes of the President that his punishment should be remitted.

Firmness may, under some circumstances, be required as an element of security to the citizens of the United States and other persons in countries conquered by our arms. When such is the case it should be unshrinkingly exercised; but when a merciful course can be safely indulged it is strongly commended as promising in the end the best results. Such a course is prompted by the better feelings of our nature, and, on the ordinary principles of human action, can not fail to promote quiet, security, and conciliation. I would therefore suggest that this course be adopted in all the other cases not finally disposed of, so far as considerations of safety will allow.

\* \* \* \* \*

Very respectfully, your obedient servant,

W. L. MARCY,  
*Secretary of War.*

Col. STERLING PRICE,

*Commanding United States Forces, Santa Fe, N. Mex.*

For the reasons stated in the foregoing correspondence the President declined to exercise the power to pardon vested in him as chief civil magistrate of the United States, but as Commander in Chief of the Army authorized the military governor to use his discretion in the matter, and the prisoner was pardoned by the governor.

The events resulting from this insurrection did not escape the attention of Congress. That body, on July 10, 1848, passed a resolution calling upon the President for information in regard to the existence of civil governments in New Mexico and California; their form and character; by whom instituted and by what authority, and how they were maintained and supported; also whether any persons had been tried and condemned for "treason against the United States" in New Mexico.

President Polk replied to said resolution by message (dated July 17), received July 24, 1848, in which he discusses the character of military government, taking the position that such a government may exercise the "fullest rights of sovereignty." With said message he transmitted the correspondence above referred to and also a letter received by him from the Secretary of War. In this message President Polk said:

The temporary governments authorized were instituted by virtue of the rights of war. The power to declare war against a foreign country, and to prosecute it according to the general laws of war as sanctioned by civilized nations, it will not be questioned, exists under our Constitution. When Congress has declared that war exists with a foreign nation, "the general laws of war apply to our situation," and it becomes the duty of the President, as the Constitutional "Commander in Chief of the Army and Navy of the United States," to prosecute it.

In prosecuting a foreign war thus duly declared by Congress we have the right, by "conquest and military occupation," to acquire possession of the territories of the enemy and, during the war, to "exercise the fullest rights of sovereignty over it." The sovereignty of the enemy is in such case "suspended," and his laws can "no longer be rightfully enforced" over the "conquered territory" or be obligatory upon

the inhabitants who remain and submit to the conqueror. By the surrender the inhabitants pass under a "temporary allegiance" to the conqueror and are "bound by such laws," and such only, as "he may choose to recognize and impose." From the nature of the case, no other laws could be obligatory upon them; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. "These are well-established principles of the laws of war as recognized and practiced by civilized nations, and they have been sanctioned by the highest judicial tribunal of our own country."

The letter from the Secretary of War, which accompanied the President's message, was as follows:

WAR DEPARTMENT,  
*Washington, July 19, 1848.*

SIR: In compliance with your direction to be furnished with such information as may be in this Department, to enable you to answer the resolutions of the House of Representatives of the 10th instant, in relation to the civil governments in New Mexico and California, to the appointment of civil officers therein and the payment of their salaries, to trials for treason against the United States in New Mexico, etc., I have the honor to state that the documents from this Department which accompanied your message to the House of Representatives of the 22d of December, 1846, in reply to a request by that body for information "in relation to the establishment or organization of civil government in any portion of the Territory of Mexico which has been or might be taken possession of by the Army or Navy of the United States," contain all the orders and directions which had been issued by the War Department previous to that time and all the information then known here in regard to the form and character of the governments established in New Mexico and California, the authority by which they were established, and the appointment of civil officers therein.

The documents which accompany this communication contain all the information on the same subjects subsequently received at this Department, as well as all the orders and instructions issued from it since the date of that message.

The governments in New Mexico and California resulted from the conquest and military occupation of these territories, and were established by the military officer in chief command. They have been continued by the same authority, and whatever changes may have occurred in the office of governor have been generally made by the commanding military officer without special instructions from this Department. In respect to California instructions were given to General Kearny to proceed from New Mexico to that territory, and, on his arrival, to hold it and exercise, so far as was necessary, civil functions therein. Col. R. M. Mason, of the First Regiment of Dragoons, was afterwards sent to take chief military command of that territory whenever General Kearny, who had leave to return to the United States, should withdraw from it; and as an incident of such command to exercise the duties of temporary civil governor, or make proper arrangements for a civil government therein.

It appears by the accompanying papers that Charles Bent, who had been appointed civil governor of New Mexico by General Kearny, was murdered in an insurrection which took place in January, 1847, and the office of governor by that event was devolved on Doniciano Vigil, who was secretary of state under Governor Bent.

The appointment not only of governor but of all the other civil functionaries was left to the military authority, which held the country as a conquest from the enemy. There is no other information in this Department in relation to the changes in the civil officers of either New Mexico or California than such as is contained in the documents which accompany this communication.

It is presumed that the expenses of the civil government in both of these territories have been defrayed by revenues raised within the same. There is nothing in the

documents in the Department, nor have I information from any other source, to show that the salaries of the officers of the civil government in either have been paid from the Treasury of the United States, or that any money has been drawn therefrom to defray any part of the expenses of the civil government established in them.

It appears by the accompanying documents that early in January, 1847, there was an insurrection in New Mexico, confined to that part of it which lies east of the Rio Grande, and many murders, mostly of American citizens, were perpetrated. By the energetic conduct of our military force it was suppressed; not, however, until after considerable loss of life on both sides. Some of the instigators of it, taken in arms, were executed by the military authority, and others deeply implicated in the crimes committed were turned over for trial to a civil tribunal called a "district court of the United States." They were, in form, charged with treason against the United States, condemned, and some of them executed. In April, 1847, the person acting as district attorney on their trial addressed a letter to the Attorney-General of the United States (a copy of which is among the documents appended hereto), but it was not received until the latter part of May or the first of June of that year. By this letter it appears that objections were made at the trials by the accused to the jurisdiction of the court. It was urged by them that being citizens of Mexico before the conquest of the territory they did not become thereby citizens of, and, consequently, could not be guilty of the crime of treason against the United States. These objections were overruled, the trials proceeded and resulted in the conviction and execution of several of the accused.

This letter was referred to this Department by the Attorney-General with a suggestion that he would give an official opinion upon the questions presented, if, as is the legal course, it should be requested; but the error in the designation of the offense was too clear to admit of doubt, and it is only in cases of doubt that resort can be had to the Attorney-General for his opinion. On the 26th of June, 1847, I wrote to the commanding officer of Santa Fe a letter (a copy of which accompanies this communication) in which the incorrect description of the crime in the proceedings of the court is pointed out. It is therein stated that "the territory conquered by our arms does not become, by the mere act of conquest, a permanent part of the United States, and the inhabitants of such territory are not, to the full extent of the term, citizens of the United States. It is beyond dispute that, on the establishment of a temporary civil government in a conquered country, the inhabitants owe obedience to it, and are bound by the laws which may be adopted; they may be tried and punished for offenses. Those in New Mexico, who in the late insurrection were guilty of murder, or instigated others to that crime, were liable to be punished for these acts either by the civil or military authority; but it is not the proper use of legal terms to say that their offense was treason committed against the United States. For to the Government of the United States, as the Government under our Constitution, it would not be correct to say that they owed allegiance. It appears by the letter of Mr. Blair, to which I have referred, that those engaged in the insurrection have been proceeded against as traitors to the United States. In this respect I think there was error, so far as relates to the designation of the offense. Their offense was against the temporary civil government of New Mexico and the laws provided for it, which that government had the right and, indeed, was bound to see executed."

No copy of record of the proceedings of the court, on these trials for treason, has been received at this Department.

Very respectfully, your obedient servant,

W. L. MARCY, *Secretary of War.*

To the PRESIDENT.

(House Ex. Doc. No. 70, first session, Thirtieth Congress, War Dept. Cong. Doc. 521.)



The situation in New Mexico at that time was as follows: The government of New Mexico asserted sovereignty over said territory. The government of Texas also asserted sovereignty thereover. A portion of the inhabitants acknowledged allegiance to Mexico and a portion to Texas. A portion of the inhabitants acknowledged the authority of the United States resulting from the military occupation, but by far the greater portion of the inhabitants refused such acknowledgment and were attempting to expel the forces of the United States.

Attention is directed to the fact that at the time these trials occurred the treaty of peace with Mexico had not been signed, but the United States has always maintained that it acquired title to Mexico and California by conquest, and not from the treaty. The treaty does not pretend to cede territory. It is a treaty of peace in which Mexico acknowledged the rights secured by the United States by conquest. The title of the United States commences with the completion of the conquest and dates from the period when the territory was occupied by the United States military forces.

The military government of Cuba has issued certain orders in respect of pardons by that government. Copies of such of said orders as have come to my notice are transmitted herewith, being Headquarters Division of Cuba, series 1900, Nos. 22, 26, 30, 37, 38, 43, 46, 48, 69, 104, 105, 111, 137, 139, 143, 156, 175, 197, 206, 240, 395, 462, 489, 498, 518. (And also of the series of 1901, Nos. 4, 5, 12, 16, 113.)

In a communication to the War Department, dated May 22, 1901, Maj. Gen. Leonard Wood, military governor of Cuba, having reference to an exercise, by the courts of Cuba, of the power to remit unexpired sentences imposed in criminal cases, says:

Under the Spanish law the sentencing court retains jurisdiction over the prisoner sentenced, as to questions of pardon, release, etc., irrespective of place of imprisonment, whether within or without the island of Cuba.

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**IN THE MATTER OF THE COMMUTATION BY THE COURTS OF CUBA OF THE SENTENCES HERETOFORE IMPOSED BY SAID COURTS ON PERSONS CONVICTED OF CRIMINAL OFFENSES COMMITTED IN CUBA WHEN THE CONVICTED PERSONS ARE SERVING OUT SAID SENTENCES IN PRISONS SITUATED IN TERRITORY NOW SUBJECT TO THE SOVEREIGNTY OF SPAIN.**

[Submitted June 5, 1901. Case No. 277, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge and comply with your request for a report on a matter arising as follows:

Prior to January 1, 1899, certain residents of Cuba were convicted of criminal offenses and sentenced to imprisonment. These sentences were executed by transporting the persons to Spain and incarcerating

them in penal institutions there situate. Upon the sovereignty of Spain being withdrawn from Cuba, such of these convicts as were serving unexpired sentences remained in the penitentiary in Spain to which they had been committed.

'In a communication to the War Department, dated May 22, 1901, Major-General Wood, military governor of Cuba, says (1st End. Doc. No. 40, Case 277):

Under the Spanish law the sentencing court retained jurisdiction over the prisoner sentenced as to questions of pardon, release, etc., irrespective of place of imprisonment, whether within or without the island of Cuba.

The military government of Cuba has issued the following orders:

No. 26.]

HEADQUARTERS, DIVISION OF CUBA,  
*Habana, January 18, 1900.*

The military governor of Cuba, upon the recommendation of the secretary of justice, directs the publication of the following order:

I. Hereafter, whatever time prisoners who may be condemned to any of the correctional or light punishments specified in article 24 of the Penal Code may have been held in provisional imprisonment shall be counted as a part of their term of service and deducted therefrom.

II. A like deduction, but limited to one-half the period of provisional imprisonment, shall be made in favor of prisoners sentenced to any of the punishments known as "exemplary punishment" (*pena afflictiva*) in article 24 of the Penal Code.

[SEAL.]

ADNA R. CHAFFEE,  
*Brigadier-General, Chief of Staff.*

No. 137.]

HEADQUARTERS, DIVISION OF CUBA,  
*Habana, April 5, 1900.*

The military governor of Cuba, upon the recommendation of the secretary of justice, directs the publication of the following order:

Order No. 26, Headquarters Division of Cuba, dated January 18, 1900, being in the nature of a provision favorable to the prisoner, is, in accordance with the provisions of article 21 of the Penal Code, declared to have retroactive effect.

ADNA R. CHAFFEE,  
*Brigadier-General, U. S. Volunteers, Chief of Staff.*

In administering said orders the courts of Cuba have remitted a portion of the sentences imposed by Cuban courts, during the time Cuba was under the sovereignty of Spain, upon Ramon Ulque Mesa, Francisco Risco Orihuela, Florentino de la Paz, Pascual Campos, Santiago Ibañez, Candido Figueroa y Acosta, Tomás Sanchez or Gonzales, and Isidoro Caballero Lozano, each of whom is now confined in a penal institution in Spain. (Doc. 40, Case No. 277.)

The military governor of Cuba requests the War Department to call upon the State Department to enter upon diplomatic negotiations with the Government of Spain to the end that the Government of Spain recognize said modification of said sentences so made by the courts of Cuba. (1 End. Doc. 40, Case No. 277.)

The question for the Secretary of War to determine appears to be: Is the Secretary of War justified in requesting the State Department to inaugurate negotiations with Spain to accomplish this purpose?

The treaty of peace between Spain and the United States provides as follows:

ART. XII. Judicial proceedings pending at the time of the exchange of ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

1. Judgments rendered either in civil suits between private individuals, or in criminal matters, before the date mentioned, and with respect to which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out.

It will be noticed that judgments in criminal matters are to be considered *final* in those cases only "*with respect to which there is no recourse or right of review under the Spanish law.*"

If the military governor is correct in saying that under Spanish law the court imposing sentence retains jurisdiction to pardon or release the convicted person and said jurisdiction extended to commutation of sentences, it follows that the convicted persons had a continuing right of recourse to the court in which they were convicted and sentenced, and the court had and retained the right to review the matter; therefore the judgments are not to be considered "*final*" as that word is used in the treaty.

I understand the purpose of paragraph 1 of Article XII of the treaty to be to preserve the jurisdiction of the courts of Cuba in matters pending before them. If so, Spain is bound to recognize the jurisdiction of the courts of Cuba to exercise the right of commutation of sentence when the right is exercised pursuant to Spanish law.

The Secretary will not fail to observe that the commutation of sentence made in the cases under consideration was made in compliance with the orders of the military government above set forth. Whether or not the Government of Spain will go back of the judgment commuting the sentence and review or consider the reasons whereby the court was induced to enter such judgment, can not be determined by the War Department.

The determination of the Spanish Government as to what it will or will not consider in connection with such commutation, will doubtless turn upon considerations relating to the comity of nations rather than the provisions of the treaty or the requirements of international law.

I understand that the Government of Spain takes the position that native Cubans now undergoing penal servitude in Spain are properly a charge upon the present government of Cuba, which should assume the trouble and expense of their further punishment, and Spain is now seeking to induce the United States to accept this view and permit the return to Cuba of such convicts now in Spain. If such is the case, it appears to the writer that compliance with the request of

the military governor of Cuba, made herein, would commit the United States to the principle advanced by Spain, that the duty of the sovereign to provide for the carrying out of court sentences in criminal cases attached to the territory in which the court was sitting at the time the sentence was imposed, and passed with the sovereignty.

To what extent, if at all, this request, if made, would embarrass the State Department in the negotiations now in progress respecting a new or additional protocol between the United States and Spain, I am not advised. It seems plain, however, that if the matter is referred to the Secretary of State he should be left entirely free to exercise his judgment and discretion as to the propriety and advisability of presenting the request to the Government of Spain.

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Further proceedings were had in this matter, as follows:

JUNE 5, 1901.

SIR: The War Department has received a communication from Maj. Gen. Leonard Wood, U. S. V., military governor of Cuba, regarding the commutation by the existing courts of Cuba of sentences imposed by the courts of Cuba under Spanish dominion upon persons convicted of criminal offenses committed in Cuba, where the convicts are serving out said sentences in prisons situated in territory now subject to the sovereignty of Spain.

A copy of said communication is herewith transmitted. Also copy of letter to the military governor of Cuba, dated May 13, 1901, from the Department of State and government for Cuba, together with the original eight certificates showing the commutation of eight sentences of persons situated as above set forth.

Also copy of a report on said matter by the law officer of the Division of Insular Affairs, War Department.

I do not feel at liberty to request you to present this matter to the Government of Spain. I submit the matter for your consideration and determination. If any further information in regard thereto or further action thereon by the authorities in Cuba is desired by you, please advise me. If the War Department can render no further service in this matter, I await your decision as to the course to be pursued.

Very respectfully, yours,

ELIHU ROOT, *Secretary of War.*

THE SECRETARY OF STATE.

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DEPARTMENT OF STATE,

*Washington, June 28, 1901.*

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant, inclosing certain certificates from Cuban courts showing the commutation of sentences imposed on Ramon Ulque y Mesa, Francisco Risco Orihuela, Florentino de la Paz, Pascual Campos, Santiago Ibañez, Candido Figueroa y Acosta, Tomás Sanchez or Gonzales, and Isidoro Caballero Lozano, who were convicted of criminal offenses committed in Cuba and are now serving out those sentences in Spain.

The United States *chargé d'affaires ad interim* at Madrid has been directed to bring these papers to the attention of the Spanish Government, referring to the request of the military government of Cuba that ~~these~~ men may have the benefit of the reduction of sentence and to ask to be advised as to the action taken.

I have the honor to be, sir, your obedient servant,

DAVID J. HILL, *Acting Secretary.*

THE SECRETARY OF WAR.

**IN THE MATTER OF THE CONTRACT BETWEEN THE UNITED RAILWAYS OF THE HABANA AND REGLA WAREHOUSES (LIMITED) AND THE CUBAN AND PAN-AMERICAN EXPRESS COMPANY.**

[Submitted December 18, 1900. Case No. 1366, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge your verbal request for an "expression of views" on this controversy, and to comply therewith.

This Department is not officially advised that complete and final action on this controversy has been had by the administrative authorities in Cuba. Governor-General Wood has made an order annulling the contract involved. Subsequently he referred the matter to the administrative council of the island of Cuba. Informal advices are received by the Department from the express company that the administrative council has sustained the legality and propriety of the order annulling the contract. The complete record of the administrative proceedings herein have not yet been received at the Department, nor has a formal appeal been regularly presented to the Secretary of War. Therefore, a formal report on the matters involved is not presented.

A copy of the contract regarding which this controversy exists may be conveniently secured by reference to page 37, *et seq.*, of the brief filed herein by Messrs. Coudert Brothers on behalf of the express company.

An examination of this contract will, in my judgment, disclose that it is of a kind and character which would be sustained in the Federal courts of the United States. (See Express Company cases, 117 U. S., pp. 1-29.)

The objections urged against said contract by the Cuban authorities are as follows:

First. That said contract creates a monopoly by giving to the Cuban and Pan-American Express Company the exclusive privilege of conducting an express business on the lines of said railway.

In the Express Company cases above cited, the United States Supreme Court held (syllabus):

Railroad companies are not required, by usage or by the common law, to transfer the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled.

Railroad companies are not obliged, either by the common law or by usage, to do more as express carriers than to provide the public at large with reasonable express accommodations; and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing express business upon their passenger trains. (117 U. S., pp. 1-2.)

It does not appear that any other express company is desirous of engaging in the express business on the lines of said consolidated

railway. The action of the Cuban authorities seems to have been the determination of an abstract proposition, and not in an existing case.

Second. The Cuban authorities assail this contract on the ground that it is therein attempted to relieve the railway company from transporting express matter, and assert that this violates the provisions of the Spanish law and the charter of the railway company requiring the railway company itself to transport the express matter.

The opening paragraph of the contract recites as follows:

Nothing herein contained shall bind the railway company to do any act forbidden or required by its concession or the laws from time to time in force in Cuba.

The provision complained of is found in the fifth paragraph of the contract. That paragraph starts out with a limitation as follows:

The railway company agrees, so far as it lawfully may—

And closes as follows:

It is, however, expressly stipulated by the railway company that the present agreement is in no way meant to alter, modify, or disturb the duties imposed on the railway company as to mails and other services that may be required by the Government under the terms of the concession.

The contract contemplates that the railway company may accept express matter for transportation over its lines, and makes provision that such express matter, being received by the railway company, will be turned over to the express company and handled by the employees of the express company instead of by the employees of the railway company. I can see nothing in this stipulation calling for drastic measures by the Government.

Third. The Cuban authorities further object to this contract because it is therein stipulated that the express company assumes to pay all losses or damages to persons or property occasioned during transportation over said railway. The objection made is that thereby the railway company avoids liability. The complete answer to this objection is found in the fact that the railway company can not avoid its liability by the contract with the express company, nor does it appear that the contract undertook such avoidance. The contract appears to be intended to provide indemnity for the railway, and not a limitation on the railway's liability.

Fourth. The Cuban authorities also object to this contract on the ground that it is therein provided that the express company may charge one and one-half the rates for transportation which were in existence at the time the contract was created, and that such rates were put in force in an illegal and unlawful manner. If this objection exists, it would seem that the proper remedy is to regulate the rate and require the acceptance of the lawful amount instead of annulling the contract. The express company represents that it has abandoned the increased rate and now transports express matter at the same rate

which prevailed prior to the creation of the contract, and in addition collects and delivers express matter without extra charge.

From what I am able to learn, both from the papers on file and from information informally received, it appears that after the creation of the contract the express company exercised the rights secured thereby in such manner as to be abusive. They exacted the payment of rates higher than those theretofore prevailing and required their employees to pass through trains and compel the passengers to surrender hand baggage to the express company and pay a fee for the transportation thereof, and in numerous ways sought to increase their business. This occasioned great dissatisfaction, and in consequence thereof the Cuban authorities felt required to protect the public from the action of the express company. Thereupon the administrative authorities saw fit to annul the contract. The express company now represents to the department that these objectionable practices have been discontinued.

I entertain the view that the administrative authorities of Cuba, in seeking a remedy to correct the abuses growing out of this contract, should have confined themselves to the authority to regulate the conduct of the business and not attempt to exercise the power to abrogate personal contracts.

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Copy of the foregoing report was transmitted to the military governor of Cuba for his consideration in determining the questions discussed. The action of the government of Cuba was as set forth in the following order:

No. 14.]

HEADQUARTERS DEPARTMENT OF CUBA,  
*Habana, January 15, 1901.*

The military governor of Cuba announces the following decision in the matter of the validity of the contract existing between the United Railways of Habana and the Cuban and Pan-American Express Company:

Whereas the legal representative of the Cuban and Pan-American Express Company has stated that the express company only claims to be, under its contract, the instrument or agent for a special object of the railroad company;

Whereas no delegation or alienation of the powers or responsibilities of the railroad company have been made to the express company whereby the railroad company is in any way relieved of the responsibilities imposed upon it by the laws in force in matters of transportation;

Whereas the railroad company, under the existing contract, must receive express matter from any other company or private person who may present it for transportation and transport it in accordance with the tariffs prescribed by the railroad laws:

Therefore the military governor decides that the contract existing between the United Railways of Habana and the Cuban and Pan-American Express Company is valid and lawful.

H. L. SCOTT, *Adjutant-General.*

**IN THE MATTER OF THE PROTEST OF M. F. VIONDI, AN INHABITANT OF THE ISLAND OF CUBA AND AN ATTORNEY AT LAW, AGAINST THE ORDER OF THE MILITARY GOVERNOR OF CUBA, DATED JULY 29, 1899, BEING NO. 184, HEADQUARTERS DIVISION OF CUBA.**

[Submitted August 29, 1899. Case No. 701, Division of Insular Affairs, War Department.]

The order against which this protest is made is as follows:

No. 124.

HEADQUARTERS DIVISION OF CUBA,

*Habana, July 29, 1899.*

The military governor of Cuba directs the publication of the following order:

I. Hereafter all proceedings known as *contencioso-administrativos* pending before the sala de lo civil of the audiencia of Habana, which may have been established against decisions rendered prior to January 1, 1899, by authorities under Spanish sovereignty, are hereby suspended. The said sala of the audiencia shall declare all such cases closed and order that no further action be followed to reach the final decision.

II. Immediately upon issuing such orders, against which there shall be no recourse, said sala shall require that the administrative record of proceedings, called for by the sala, in virtue of the establishment of the recourse *contencioso*, be forwarded to the department of justice and public instruction. Said tribunal shall, however, retain the record of proceedings that may have taken place before the same.

III. The parties interested in said recourses (*contencioso administrativos*) may appear before the military governor prior to September 1, 1899, which date will not be extended, to solicit that the decision excepted rendered by the Spanish authorities be revised and that the question which originated the claim be decided. Said petitions shall be filed with the department of justice and public instruction, which will forward them with a report to the military government. All interested parties failing to present their claims within the period above specified shall forfeit their right to claim of any kind.

IV. The decision which the military government may render, in the matter of claims mentioned in the preceding article, shall be with respect only to the fundamental and essential parts of the questions involved in the decisions of the Spanish authorities and against which the aforesaid recourses (*contencioso administrativos*) may have been established.

The revision for which petition may be made, according to the provisions of the preceding article, shall not extend to matters relating to infringements of a formal character, whether these refer to the procedure or involve the competency or incompetency of the authorities or functionaries rendering the decisions to which exception is made.

All petitions for revision which refer solely to such matters shall be denied by the department of justice and public instruction, and no action shall be taken on them.

ADNA R. CHAFFEE,

*Brigadier-General, Chief of Staff.*

To properly understand the purpose and effect of this order it is necessary to review the Spanish judicial procedure to which said order relates and is intended to supplant.

In Spain and her colonies there is established a review of certain administrative actions by appeal to the courts from the decisions of



administrative officers. This is known as "*recurso contencioso administrativo*."

There is a tribunal at Madrid and there were local tribunals in Cuba, Porto Rico, and the Philippines, respectively, having jurisdiction of said actions. The Cuban tribunal consisted of the president of the territorial audiencia, the associate judge of the civil chamber (*sala de lo civil*) of the audiencia, and four administrative magistrates.

In Cuba the proceedings to review the actions of administrative officers had to be instituted within three months after the decision of the administrative officer was brought to the attention of the aggrieved party. Not only private parties affected by the decision, but the public administration, have the right to this remedy.

The proceeding is begun by a complaint (*demanda*) which is accompanied by the documents necessary to show the basis for the proceedings. To this an exception may be entered on the ground that there is no jurisdiction, or defect of parties to the proceedings, or a defect in the complaint proper. From the decision on these points an appeal lay to the Madrid tribunal. If none of the preceding objections are taken, there must be an answer to be accompanied by such documents as may be proper and pertinent. Then comes the proof which follows the ordinary procedure and the decision which embodies a statement of facts and conclusions of law.

Upon the occupation of Cuba by the United States, jurisdiction in cases of this character was conferred on the court known as the civil chamber (*sala de lo civil*) of the audiencia of Habana.

By Order No. 41, headquarters Division of Cuba, dated June 14, 1899, it was provided that the supreme court of Cuba should have jurisdiction to hear and determine—

14. Petitions for revision in civil, criminal, and administrative matters (*contencioso administrativo*).

18. Appeals from the decisions of the audiencia of Habana in administrative cases (*contencioso administrativo*). (See subdivisions 14 and 18, sec. 7.)

By this order the supreme court of Cuba was given jurisdiction of appeals in these cases, which jurisdiction had theretofore been in the supreme court at Madrid.

The order of July 29, 1899, against which this protest is filed, undertakes to suspend the proceedings in all cases of this character pending before the court known as *sala de lo civil* of the audiencia of Habana, which involved decisions made by administrative officers prior to January 1, 1899, and requires that said court shall send the records in such cases to the department of justice and instruction, where the further proceedings are to be had. The parties interested are required to file a petition before September 1, 1899, asking that action be taken in the premises, which action is to be the report on the matter by said department and the decision thereon of the military governor.

All cases arising on decisions made since January 1, 1899, are still to be heard by the *sala de lo civil* of the Habana audiencia.

There seems to be no extraordinary occasion for making a distinction between cases involving decisions made by administrative officers prior to January 1, 1899, and those made subsequent thereto. There is no question that the *sala de lo civil* of the audiencia of Habana properly had and retains jurisdiction. The purpose of the order is to deprive the court of jurisdiction and suspend proceedings in certain cases distinguishable from those in which the court retains jurisdiction only by the time at which the cause of action arose.

But if the reasons for the change were incontestable the order could not be sustained, as it is, in my judgment, contrary to article 12 of the treaty of peace with Spain. That article provides as follows:

Judicial proceedings pending at the time of the exchange of ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

\* \* \* \* \*

2. Civil suits between private individuals which may on the date mentioned be undetermined shall be prosecuted to judgment before the court in which they may then be pending or in the court that may be substituted therefor.

I understand the expression "civil suits between private individuals" to mean civil suits involving the rights of private individuals and to embrace actions of the character under consideration. The order depriving the *sala de lo civil* of jurisdiction does not distinguish between cases pending at the "time of the exchange of ratifications of this treaty" and those instituted thereafter. Even in the absence of treaty stipulations the rule is that as to individual rights a treaty is to be considered as dated at its ratification. (*Haver v. Yaker*, 9 Wall., 32; *United States v. Sibbald*, 10 Pet., 313, 323; *United States v. Arredondo*, 6 Pet., 748, 749.)

The mutual exchange of ratifications of the late treaty with Spain was made April 11, 1899. As to cases pending in the courts at said date, the order under consideration is void, being in derogation of the provisions of the treaty.

The Spanish law required actions of this character to be instituted within three months after the decision appealed from became known to the party aggrieved. From January 1 to April 11, 1899, is a period of over three months. It follows that all or nearly all the cases to review decisions made prior to January 1, 1899, were pending when the mutual ratifications of the treaty were exchanged.

In many instances executive officers in the administration of affairs of their office act judicially. (*Sioux City v. Wyckoff*, 43 Neb., 265; *State ex rel. Wyckoff v. Merrell*, 61 N. W. Rep., 754.)

This is especially true of administrative officers in Spanish dependencies. Where such is the case, the matters before such officer are

“judicial proceedings pending,” and where such was the case in Cuba the disposition thereof is controlled by said treaty stipulation.

A treaty is a law of the land whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. (*In re Cooper*, 143 U. S., 472, 503; *Edye v. Robertson*, 112 U. S., 580.)

A treaty is the supreme law of the land. (*Whitney v. Robertson*, 124 U. S., 190; *United States v. Rauscher*, 119 U. S., 407; *Hauenstein v. Lynham*, 100 U. S., 483; *Fellos v. Blacksmith*, 19 How., 366; *Strothers v. Lucas*, 12 Pet., 410.)

This rule is of especial force under existing conditions in Cuba, since the provisional government is being maintained there by the United States pursuant to treaty stipulation that “the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation.” (Treaty of Paris, Art. I.)

This treaty stipulation is one of the bases on which the existing government of Cuba stands, and is one source from which it derives authority. Treaties should be liberally construed, so as to carry out the apparent intention of the parties. (*De Geofroy v. Riggs*, 133 U. S., 258.)

It must have been well known to the distinguished diplomats and statesmen who formulated the treaty of peace that—

Though the powers of the military occupant are absolute and supreme and immediately operate upon the political conditions of the inhabitants, the municipal laws of the conquered territory such as affect private rights of person and property and provide for the punishment of crime are considered as continuing in force so far as they are compatible with the new order of things until they are suspended or superseded by the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation. \* \* \* The judges and the other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the law of the land as between man and man, under the supervision of the American commander in chief. (Letter from President McKinley to the secretary of War, July 13, 1898; General Orders, War Department, No. 101.)

The members of the Commission must also have known at the time of their deliberations, in December, that in the proclamation above quoted from, published in General Orders, July 18, 1898, the President had said with reference to the doctrine expressed in the language quoted and its recognition in Cuba:

This enlightened practice is, as far as possible, to be adhered to on the present occasion.

It therefore seems that the insertion of this stipulation (Article XII) in the treaty was intended to accomplish more than a simple declaration of the usual rule of international law.

In the treaty between the United States and Spain dated February 22, 1819, it was stipulated that all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities in the territory ceded, should be ratified and confirmed by the United States. In discussing the purpose and the intent with which this stipulation was inserted in the treaty, the United States Supreme Court say:

It is not unreasonable to suppose that His Catholic Majesty might be unwilling to expose the acts of his public and confidential officers, and the titles of his subjects under those grants, to that strict and jealous scrutiny which a foreign government, interested against their validity, would apply to them. (*United States v. Clark*, 8 Pet., 436, 449.)

In the matter under consideration it is also not unreasonable to suppose that Spain was unwilling to expose the acts of its public and confidential officers, and the property rights of its subjects acquired under those acts, to the action of a military tribunal of a country with which it was negotiating the termination of war. Hence the provisions of said Article XII in the late treaty of peace.

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Respecting the matter discussed in the foregoing report, the military governor was advised as follows (see cablegram, A. G. O., November 4, 1899):

The President directs that you report as soon as possible your reasons for removing the proceedings known as "contencioso-administrativos" from the jurisdiction of the "sala de lo civil of the audiencia of Habana," and in the meantime, and until further orders from the President, the operation of your order No. 124, of July 29, 1899, providing for such removal, is hereby suspended.

The matter being reconsidered, the military governor of Cuba issued the following order:

No. 2.]

HEADQUARTERS DIVISION OF CUBA,

*Habana, January 3, 1900.*

The military governor of Cuba directs the publication of the following order:

Order No. 124, Headquarters Division of Cuba, dated Habana, July 29, 1899, having reference to contencioso-administrativo cases pending before the sala de lo civil of the audiencia of Habana, is hereby revoked.

ADNA R. CHAFFEE,

*Brigadier-General, Chief of Staff.*

**THE DISPOSITION TO BE MADE OF CERTAIN EFFECTS OF MORTIMER COOK, DECEASED, NOW IN THE POSSESSION OF THE MILITARY AUTHORITIES OF THE UNITED STATES IN THE PHILIPPINES.**

[Submitted February 19, 1900. Case No. 1365, Division of Insular Affairs, War Department.]

SIR: I have the honor to report upon a matter arising as follows:

Mortimer Cook, a civilian, aged 73, and a citizen of the State of Washington, United States, died at brigade hospital, Iloilo, Philippine Islands, on November 22, 1899, leaving personal property of such value and amount that, after paying the expenses of his illness and burial, there remained one watch, one medal, one trunk containing wearing apparel, and \$673.68, proceeds of the sale of the remainder of his personal effects at the time of his death.

A few hours prior to his death and after he had been informed of his approaching dissolution, the said Mortimer Cook stated to his attending surgeon, G. H. Calkins, acting assistant surgeon, U. S. A., and W. G. Haan, captain and adjutant, Tenth Infantry, U. S. V., that he desired in case he died that all his money and effects should be sent to Mrs. Farrie Cook Litchfield, at Plaza Hotel, Chicago, Ill.

After the death of said Mortimer Cook, the commander of the United States forces in the Visayan district, in which Iloilo is situated, directed Capt. W. W. Wotherspoon, Twelfth Infantry, U. S. V., collector of customs at the port of Iloilo, to take charge of and close up the estate of the deceased, acting in said matter in the capacity of a United States consular agent.

This direction was embodied in the following order:

*To the Collector of Customs and Acting United States Consular Agent, Iloilo, P. I.*

SIR: In the absence of any direct representative of the late Mortimer Cook, an American citizen, who died at the hospital in Iloilo, P. I., November 22, 1899, and there being no civil functionary with appropriate powers in this city, you are directed, in your capacity as United States consular agent, to take charge of the estate of the late Mortimer Cook and dispose of the same in accordance with United States laws and consular regulations.

Pursuant to such direction, Captain Wotherspoon reduced the personal estate of the deceased to his possession, paid the expenses of his final illness and interment, and remitted the cash balance of \$673.68 to the Secretary of the Treasury of the United States, as required by paragraph 385 of Consular Regulations of the United States.

In further pursuance of said consular regulations, Captain Wotherspoon transmitted the watch and medal belonging to said estate to the Secretary of State, together with a report of his action regarding said estate, an inventory of the effects of the deceased, an account current of money received and expended, with proper vouchers in regard thereto.

The report shows that Captain Wotherspoon retains possession of the trunk, a portion of the wearing apparel, and certain papers, which he states are of no salable value at Iloilo and are retained subject to further disposition.

Upon the receipt of the report and two packages containing the effects of the deceased forwarded to the State Department, the Secretary of State referred the original communication from Captain Wotherspoon and the packages to the War Department by letter from the Hon. Thomas W. Cridler, Third Assistant Secretary of State.

By this action it is understood that the State Department declines to assume responsibility in the further disposal of the effects of Mortimer Cook, deceased, and entertains the view that jurisdiction in the premises attaches to the War Department.

There also appears in said letter from the State Department a suggestion expressed as follows:

It would appear from an order to Captain Wotherspoon from military headquarters, which accompanies the letter, that he is performing duties similar to those performed by a consular agent, and that for that reason he signs himself acting consular agent.

I would suggest that the attention of Captain Wotherspoon be called to the fact that as the Philippines have been taken possession of by the United States and are now under the control of the War Department, there can no longer be either actual or acting consular officers in these islands and that no reports can properly be made by him to this Department.

By Circular No. 16, Division of Customs and Insular Affairs, issued by the War Department May 11, 1899, it was ordered:

Collectors of customs appointed by the military authorities of the United States at ports in territory under military government are hereby directed to perform the duties formerly belonging to United States consuls or consular officers in such territory, so far as concerns seamen, vessels, clearances, etc.

This order was necessary to enable the territories to engage in commerce with this and other nations, and I am advised that the action of the collectors in the performance of their duties as consular agents in matters relating to commerce are recognized by custom-house officers of the United States and of other nations.

It will be observed that the order above quoted authorizes the performance of such duties as concern seamen, vessels, clearances, etc., and therefore limits the authority of such officers to matters involved in the commerce of the country, and would not authorize them to act as consular agents of the United States in administering upon the estate of a citizen of the United States.

From the papers filed herein it does not appear what action has been taken by the Treasury Department regarding the money derived from the sale of the effects of Mortimer Cook, which has been remitted to the Secretary of the Treasury. This Department has, however,

received the following letter from the Auditor of the Treasury for the State and other Departments:

WASHINGTON, D. C., *February 15, 1900.*

HON. G. D. MEIKLEJOHN,

*Assistant Secretary of War, Washington, D. C.*

SIR: I have to request that this office may be furnished with the inventory of the effects of Mortimer Cook, deceased, together with what information has been received by the War Department in regard to the heirs of the said deceased. The Third Assistant Secretary of State informed this office on the 1st instant that the original report and its inclosures, of the estate of Mr. Cook, received from Captain Wotherspoon, Iloilo, P. I., were sent to the War Department.

Respectfully,

ERNST G. TIMME, *Auditor.*

P. C. A.

Apparently the State Department refuses to consider the collector of the port of Iloilo as authorized to exercise the powers of a consular agent of the United States in the administration of estates of American citizens, deceased, while the Treasury Department entertained the view that he is authorized to exercise such powers.

It will be seen that the first question presented is, to what Department does jurisdiction attach? If the holding of the State Department is correct, the order of Captain Wotherspoon to proceed as consular agent was without authority and must be held as simply a direction that, as an officer exercising authority in territory subject to martial rule, he should be guided by rules prescribed for the action in such cases by consular agents of the United States, in which event I am of the opinion that the Treasury Department would not acquire jurisdiction, and the proper course would be for that Department to transmit the funds realized from the sale of the effects of Mortimer Cook to the War Department, and the further action in the matter be taken by this Department.

If the State Department refuses to recognize or consider the collector at the port of Iloilo as a consular agent of the United States possessing authority to act officially in matters relating to the estate of a citizen of the United States who dies in that collection district, it would seem that the War Department, in the absence of an Executive order conferring such authority, can not deal with this property as having been administered upon by a consular agent of the United States and thereby subjected to the rules and regulations established for the disposal of estates so administered.

I regret the necessity of being obliged to report this conclusion, for a very happy solution of the matter for this Department would be to allow the Treasury Department to assume responsibility for further action herein and terminate the proceeding in this Department by noti-

ying Mrs. Farrie Cook Litchfield, at the Plaza Hotel, Chicago, Ill., and the persons who may hereafter make inquiry, where the property is deposited.

This Department, however, is charged with the duties of civil government in the Philippine Islands at the present time, and upon it primarily devolves the protection of rights and property therein.

It would appear from the papers herein that said Mortimer Cook desired to make a gift of said property to the said Farrie Cook Litchfield, either *inter vivos* or *causa mortis*. From the meager account set forth in the papers herein of what took place at the time he made known his desires to the officers attending him it does not specifically appear that he delivered the property to anyone acting as the representative of the donee. Delivery is essential to the completion of a gift either *inter vivos* or *causa mortis*. If it can be established that the deceased made a complete gift of the property, an easy solution is afforded of the entire matter by simply carrying out the requirements of the gift by delivering the property or proceeds to the donee. If the gift was completed the title passed to Mrs. Litchfield, and the property does not now belong to the estate of the deceased. If the gift was completed the gentleman accepting its delivery would act as a private citizen and not as an official, and the question of authority would not be presented. It would probably hasten the final disposition of this matter if further inquiry were made to ascertain the facts in regard to the delivery of this property.

If it shall appear that this property was the subject of a completed gift to Mrs. Litchfield, the Secretary of War may then elect to consider his relation to the property as being that of a private citizen whose services are sought to be utilized for the purpose of conveying said property to the donee.

If his discretion or sense of propriety prevents him from performing such service, it would seem proper to return the property to the collector of the port of Iloilo with instruction to adopt other means of delivering the property to Mrs. Litchfield.

The *official* relation of the Secretary of War to this property arises from the fact that Iloilo is subject to martial rule and, to quote the language of the military commander of the district, "there being no civil functionary with appropriate powers in this city," it was proper for the military authorities to take charge of said effects and determine what disposition should be made thereof.

If this view of the matter shall be accepted by the Secretary of War it would seem that, by virtue of his powers as the head of said military government, he may consider said property as still being within the custody and possession of the military government of Iloilo, and subject to such order as he may see fit to make in regard thereto, or the



property may be returned to the immediate jurisdiction and possession of the military authorities in Iloilo with instruction regarding their further action in exercising the powers arising from the condition of martial rule, whereupon the military authorities could determine the question as to who is entitled to receive said property and make delivery thereof.

The attention of the Secretary of War is directed to the fact that the property is now within the United States, and that a proper proceeding would be to subject it to the jurisdiction of one of the probate courts of the United States, and that the Secretary of War may, in his discretion, select the court to whose jurisdiction and custody the property shall be subjected. Upon the property being within the territorial jurisdiction of one of the probate courts of the United States, the court would be at liberty to assume jurisdiction thereover, advertise for claimants, and hear and determine the claims made thereto. In this connection attention is directed to the report of Captain Wotherspoon to the Secretary of State, wherein he says:

No heirs have presented themselves and nothing is known here as to his heirs.  
 \* \* \* From the photographs found among his effects it appears probable that his wife is still living, but nothing is known of her address.

Allow me further to suggest the propriety of notifying Mrs. Farrie Cook Litchfield, at Plaza Hotel, Chicago, regarding this matter, and affording her the opportunity to take such steps as she may deem advisable to protect her interests, if any exist.

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The Secretary of War decided to act in this matter as a private citizen, and thereupon turned over the property to the heirs of the deceased.

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## **EXTRADITION OF FUGITIVES FROM JUSTICE WHO HAVE TAKEN REFUGE IN CUBA UNDER MILITARY GOVERNMENT.**

[Submitted January 9, 1900. Case No. 1284, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the reference to me of the letter from the Mexican ambassador at this capital, addressed to the Secretary of State, directing attention to the fact that there is now in the island of Cuba a person not of American nationality who is accused before the tribunals of Mexico with having committed a crime on Mexican territory, and requesting information as to whom to present a request for extradition, and whether provisional detention of the fugitive will be ordered; also, what rules are to be followed to secure extradition from said island.

The United States is maintaining a provisional government in the island of Cuba for the declared purposes of securing the pacification of said island and affording an opportunity to the inhabitants thereof to erect and maintain, for and by themselves, a government of and for said island. Pursuant to said purposes, the United States required Spain to relinquish all claim of sovereignty over and title to Cuba, and bound itself by treaty as follows:

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

By reason of its geographical location the island of Cuba is easy of access by ordinary sailing craft from many ports of the United States, Mexico, the states of Central America, and the states of northern South America. Therefore, if Cuba is to be a "city of refuge" for the criminals of these countries, to say nothing of the world at large, it will certainly render the task of pacification and the establishment of a stable government therein a most difficult undertaking. To prevent it from being an asylum for criminals is clearly a necessity, and necessity gives warrant for action on the part of military officers charged with performing the function of civil government, when the necessity directly relates to the purpose for which the military government was established.

The provisional government now being maintained in Cuba by the United States is undoubtedly authorized to exercise the "police powers" of a State, one of which is to apprehend and deliver to the proper tribunals persons charged with crime.

One of the obligations that, under international law, result from the fact of the occupation of Cuba by the United States is to promote the peace and welfare of the world. One means of accomplishing this is to enable the tribunals of various Governments to deal with violators of the law.

Every Government has a right to exclude from the territory under its jurisdiction persons who, from criminal propensities or other reasons, are unworthy its protection, or are calculated to work injury to the interests of the Government. This right is not created by extradition treaties. It exists independent of a treaty. Extradition treaties are simply agreements regulating the exercise of this right by the Government in whose territory the wrongdoer is found. Also, every Government has a right to punish the violators of its laws, and for that purpose may apprehend persons charged with such offenses, and extradition treaties are intended to regulate the exercise of that right, not to create it.

The provisional government of Cuba possesses both of these rights, and, in the absence of treaty regulations, is to be governed and con-

trolled by the orders of the officers under whose direction the said provisional government is now being maintained.

In the case of *Ker v. Illinois* (119 U. S., 436, 442), the Supreme Court say:

There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the Government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

Nor can it be doubted that the Government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the Government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the Government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the Government of the country of the asylum to protect the criminal from removal therefrom.

It is true that in the absence of provisions of treaties on the subject the Government of a nation is not *obliged* to surrender fugitives from justice, but it is not *prevented* from doing so. It may be done as an act of comity, and lies within the discretion of the Government whose action is invoked. Upon this question the Supreme Court of the United States, in *United States v. Rauscher*, 119 U. S., 407, 411, 412), say:

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed for trial and punishment. This has been done generally by treaties made by one independent Government with another. Prior to these treaties and apart from them it may be stated as the general result of the writers upon international law that there was no well-defined obligation on one country to deliver up such fugitives to another, and, though such delivery was often made, it was upon the principle of comity and within the discretion of the Government whose action was invoked.

I am of the opinion that a proper procedure in such cases as the one presented would be as follows:

First. The Government desiring the apprehension and extradition of a person accused before its tribunals, who has taken refuge in Cuba,

should present to the Secretary of State duly authenticated documents showing the criminal proceedings instituted in the courts of the country seeking extradition.

Second. The Secretary of State should transfer the papers to the Secretary of War.

Third. The Secretary of War, if he deems the case a proper one in which to exercise the powers invoked, will issue an order to the military governor of Cuba to cause the accused person to be apprehended and turned over to the Government making the application.

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The views expressed and the procedure recommended in the foregoing report were approved by the Secretary of War and communicated to the State Department as the views of the War Department. (See War Department letter of January 9, 1900.) The State Department informed the Secretary of War that the Mexican Government had been advised by the State Department that the procedure adopted by the War Department was the proper one to be pursued. (See State Department letter of January 13, 1900.)

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**IN RE CLAIM OF DON JOSÉ CAGIGAS AGAINST THE MILITARY GOVERNMENT OF CUBA FOR DAMAGES TO THE TUG CATALINA IN A COLLISION WITH THE GOVERNMENT BOAT NARCISO DEULOFEU IN HABANA HARBOR.**

[Submitted June 8, 1901. Case No. 2866, Division of Insular Affairs, War Department.]

The question involved is an administrative one, to wit: Shall the military government of Cuba consider itself bound by the measure of damage prescribed by the code of commerce in force in Cuba for ascertaining the damage to vessels sunk by collision with other vessels?

SIR: I have the honor to acknowledge and comply with your request for a report on the above-entitled matter.

The attention of the War Department is called to this claim by a communication from the State Department (May 22, 1901), transmitting copy of note from the Spanish minister at this capital inclosing a memorandum in support of said claim. The State Department desires to ascertain the views of the Secretary of War before replying to the Spanish minister. (Doc. 2866.)

This claim has not heretofore been presented to the War Department. If proceedings have been instituted thereon they are still pending in Cuba. The only information regarding said claim possessed by the War Department is derived from the memorandum presented by the Spanish minister. From that memorandum it appears that Don José Cagigas, a Spanish subject residing in Cuba, was the owner of

the tug *Catalina*, which was sunk in Habana harbor, on November 8, 1899, by the government boat *Narciso Deulofeu*, in the service of the custom-house, in a collision, which upon investigation by the captain of the port, an American officer, was declared by him to have been occasioned by want of skill and care on the part of the officers in charge of the government boat.

It further appears from said memorandum that the *Catalina* sunk immediately after the collision (November 8, 1899), and remained under water until some time in December, 1899, at which time the military authorities of the United States in Habana, upon their own motion, raised said tug, made certain repairs thereon, and on April 2, 1901, tendered said boat and \$900 to Don José Cagaigs in full satisfaction of his loss and damage. Don José Cagigas declines to concur in this action of the military government, and insists that under the laws in force in Cuba he is entitled to a money compensation equal to the fair market value of his tug at the time it was sunk. In support of this contention, he appeals to articles 826 and 833 of the code of commerce, continued in force in Cuba by the military government. These articles are as follows:

ART. 826. If a vessel should collide with another through the fault, negligence, or lack of skill of the captain, sailing master, or any other member of the complement, the owner of the vessel at fault shall indemnify the loss and damage suffered after an expert appraisal.

\* \* \* \* \*

ART. 833. A vessel shall be considered as lost which, upon being run into sinks immediately, and also any vessel which if obliged to make a port to repair the damages caused by the collision should be lost during the voyage, or should be obliged to be stranded in order to be saved.

It appears to the writer that article 833 prescribes a rule or measure of damage for injuries resulting from collisions of vessels, which rule is that where a vessel sinks as a result of a collision attributable to negligence, the loss is to be considered as *total*, without regard to the actual condition of the vessel, or the fact that it could be raised and repaired.

If this controversy were between private individuals, it appears to the writer that Don José Cagigas would be within his legal rights in calling for the enforcement of this rule, and I see no reason why the military government of Cuba should resist the application to itself of a measure of damage which it enforces against others.

The code of commerce which prescribes this rule likewise prescribes a procedure for its enforcement, and in order to secure the benefits of the rule the procedure should be followed.

The omission so to do, deprives the party asserting the rule of the desired advantage.

The memorandum presented by the Spanish minister does not dis-

close whether or not the claimant has fulfilled the conditions precedent devolving upon him under the provisions of said code.

It appears from said memorandum that the "adjutant-general at Habana" has notified Don José Cagigas that he must accept the tender of the repaired tug and \$900, or "seek redress through other channels," which doubtless caused the application to the Government of Spain. It does not appear from the memorandum that the military governor of Cuba has approved this action of the "adjutant-general at Habana," and therefore the claimant has not exhausted his remedies in the island. The established practice of the War Department is to require claimants asserting individual rights to exhaust the means of securing relief in Cuba before consideration is given their claims by the Secretary of War.

The Secretary of War is at liberty to instruct the military governor of Cuba as to questions of administrative policy in Cuba in advance of actual instance being presented or determined; and it appears that an administrative question is involved herein, to wit: Shall the military government of Cuba consider itself bound by the measure of damage prescribed by the code of commerce in force in Cuba for ascertaining the damage to vessels sunk by collision with other vessels?

The determination of this question devolves upon the Secretary of War, and is to be declared at such time as his discretion shall deem advisable.

The Spanish minister, in his communication to the State Department, with acumen and precision differentiates this question from its attendant facts and circumstances and presents it as follows:

LEGATION OF SPAIN AT WASHINGTON,

*Washington, May 15, 1901.*

MR. SECRETARY: I have the honor to transmit herewith to Your Excellency the memorandum of a claim that Don José Cagigas, a Spaniard, has instituted against the military authorities of the island of Cuba, and which has not as yet received a satisfactory solution. I do not consider it expedient to dwell upon the merits of the case, which are clearly set forth in the inclosed memorandum, whose views are concurred in by this legation, and I will confine myself to drawing the attention of the American Government to the infraction of the existing laws of the island of Cuba constituted by the demand that Mr. Cagigas either accept in satisfaction of his claim a sum fixed by those authorities alone or forego any indemnification.

I shall not at this time enter upon a discussion of what that indemnification should be, but will merely ask that the laws in force in such matters in the island of Cuba be respected in the case of Mr. Cagigas, and I beg Your Excellency will call thereto the attention of the Secretary of War, in whose Department I believe the antecedents of the case are filed.

Thanking Your Excellency in advance, I improve this opportunity of reiterating the assurances of my highest consideration.

ARCOS.

If the Secretary of War shall be of the opinion that an appropriate occasion has arisen for the determination of this administrative question, the request of the Secretary of State will be complied with by communicating such determination to him.

The Secretary of War determined the administrative policy for the government of Cuba in this and analogous cases as follows:

JUNE 8, 1901.

SIR: The War Department is in receipt of a communication from the State Department transmitting copy of note from the Spanish minister at this capital calling attention to the claim of Don José Cagigas for damages occasioned him by the sinking of the tug *Catalina* in Habana Harbor, resulting from collision with the custom-house boat *Narciso Deulofeu*, and the proper measure of damages to be adopted in ascertaining the indemnity.

Upon consideration thereof I am of the opinion that in cases of this character the military government of Cuba should submit to the same rule which would be enforced against private parties under like conditions, which I understand to be that prescribed in articles 826 and 833, Code of Commerce, in force in Cuba, provided the claimant follows the procedure prescribed by said Code.

I inclose you copy of my letter to the Secretary of State respecting this matter.

Very respectfully,

ELIHU ROOT, *Secretary of War*.

Maj. Gen. LEONARD WOOD, U. S. V.,

*Military Governor of Cuba.*

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**IN RE CLAIM OF THE EASTERN EXTENSION TELEGRAPH COMPANY FOR PAYMENT BY THE UNITED STATES OF SUBSIDY PROVIDED FOR BY THE TERMS OF THE CONCESSION GRANTED BY THE GOVERNMENT OF SPAIN.<sup>a</sup>**

[Submitted July 22, 1901. Case No. 219, Division of Insular Affairs, War Department.]

**SYNOPSIS.**

1. By the terms of the treaty of peace the United States did not assume the obligations of this character resting upon Spain.
2. Obligations of this character did not pass to the United States by operation of international law upon transfer of sovereignty.
3. The rule of international law as stated by the Transvaal concessions commission, 1901.

SIR: I have the honor to acknowledge receipt, by reference, of a communication dated May 23, 1901, from the Chief Signal Officer, United States Army, to the Secretary of War, "respecting the concessionary rights of the Eastern Extension Telegraph Company in the Philippine Islands," with request for remarks. In response thereto I have the further honor to report as follows. In said communication the Chief Signal Officer says:

With reference to the Visayan concession, it is believed that it should be recognized as soon as the Eastern Extension Telegraph Company and the Government of the United States can agree upon the date on which the payment of the subsidy begins, and as to the proper construction of certain portions of the original concession.

As to the payment of this concession, the Chief Signal Officer believes, with General MacArthur, that while the legal obligation of the United States to pay this subsidy would not technically exist prior to the ratification of the treaty of peace and the formal transfer of sovereignty from Spain to the United States, yet on account of the permission granted this company and its action thereunder an obligation in equity would arise to pay, at least, from and after the date of the restoration of the service.

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<sup>a</sup> See report on claim of Manila Railway Co., p. 177.

From the foregoing I conclude that the Chief Signal Officer is of opinion that the United States is legally bound to carry out the contract between the Spanish Government and the cable company, whereby Spain agreed to pay said cable company a subsidy. If such is the view intended to be expressed, I most respectfully dissent, for the reasons set forth in my report, dated December 21, 1899, on a claim of like character presented by the Manila Railway Company. A copy of said report is herewith transmitted. In said report attempt is made to demonstrate the correctness of two propositions, (1) that by the terms of the treaty of peace the United States did not assume obligations of this character resting upon Spain; (2) that obligations of this character did not pass to the United States by operation of international law upon cession of sovereignty over the Philippine Archipelago.

The questions involved in these propositions, as presented by the case of the Manila Railway Company, were referred to the Attorney-General by the Secretary of War. A copy of the opinion of the Attorney-General is herewith transmitted. As understood by me, the Attorney-General was of opinion that the obligation to pay the subsidy did not pass from Spain to the United States (pp. 6-7 and 9). The Attorney-General was, however, of the opinion that, if the islands continued to receive the benefits arising from the maintenance of said railroads, equitable considerations justified a new and original agreement with the company regarding subsidy, and negotiations therefor should be conducted with reference to existing and prospective *conditions* rather than obligations.

The attention of the Secretary is directed to the report of the Transvaal concessions commission, dated April 19, 1901. This commission was appointed by the English Government "to inquire into the concessions granted by the government of the late African Republic." In said report appears the following: ("Blue Book" for June, 1901.)

9. It is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuse to recognize them.

\* \* \*

10. Though we doubt whether the duties of an annexing state toward those claiming under concessions or contracts granted or made by the annexed state have been defined with such precision in authoritative statement or acted upon with such uniformity in civilized practice as to warrant their being termed rules of international law, we are convinced that the best modern opinion favors the view that as a general rule the obligations of the annexed state toward private persons should be respected. Manifestly the general rule must be subject to qualifications, e. g., an insolvent state could not by aggression, which practically left to a solvent state no other course but to annex it, convert its worthless into valuable obligations. \* \* \*

The Eastern Extension Telegraph Company is an English concern, and it might be well to call its attention to the foregoing declaration of the rule of international law made by said commission of the English Government.



If it be established, either by mutual recognition or authoritative declaration, that the United States is not bound to carry out the executive contract of Spain, i. e., to pay this subsidy because Spain agreed to pay it, the way would be cleared for taking up the matter of subsidy as an original proposition, in the consideration of which due regard could be had for the several important matters referred to in the communication of the Chief Signal Officer. It appears to me that the proper way to deal with this question of subsidy is to treat it as though it was an original application made by a company contemplating the construction of a *quasi* public improvement.

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**CLAIM OF VICENTE AND JOSÉ USERA RELATING TO AN ALLEGED SPANISH CONCESSION FOR THE CONSTRUCTION OF A TRAMWAY ON THE PUBLIC HIGHWAY FROM THE CITY OF PONCE, PORTO RICO, TO THE BARRIO DE LA MARINA.<sup>a</sup>**

[Submitted June 1, 1899. Case No. 696, Division of Insular Affairs, War Department.]

Proceedings examined and found to be insufficient to create a completed grant or concession.

SIR: I have the honor to acknowledge the receipt of your request for a report on the claim made by George S. Keck, George S. Willits (deceased), and Alan L. Reid, that on and prior to February 24, 1897, proceedings were had in accordance with the Spanish law then in force in Porto Rico, whereby a franchise or concession was granted to Vicente Usera and José Usera, citizens of Porto Rico, for the construction, operation, and maintaining of an electric tramway over and upon certain streets in the city of Ponce and thence over and upon the public highway between the city of Ponce and the Barrio de la Marina (harbor), being the seaport of said city.

In response to said request, an examination has been made of the documents relating to said franchise on file in this Department. From said documents it appears that prior to November 24, 1896, proceedings were had of such kind and character as to induce the Crown of Spain, then possessed of full and complete sovereignty in Porto Rico, to grant by royal decree a permit for a franchise or concession for an electric tramway, according to the plans submitted by Messrs. Vicente and José Usera.

It will be observed that this royal grant does not confer the concession upon Messrs. Usera; it simply permits the construction according to the plans submitted by those gentlemen. Under the Spanish law in Porto Rico a tramway is a railroad constructed on the public highways. (Article 69.) While the entire territory to be traversed by this pro-

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<sup>a</sup> See 22 A. G. Op., 551.

posed tramway is within the limits of the municipality of Ponce, the proposed track will occupy a state highway for a large portion of if not its entire extent. It is therefore subject to the following provisions of the Spanish law:

ART. 73. The concession of tramways belongs to the secretary of the colonies, when the works are to occupy the highroads of the state or shall simultaneously traverse highroads of the state and highways of the province and municipalities.

\* \* \* \* \*

ART. 76. Tramway concession can not be granted for more than sixty years, and shall be subject to an auction in regard to the maximum schedule of rates and to the duration of the concession.

From the "Regulations for the execution of the railroad law of the island of Porto Rico," promulgated January 27, 1888, the following is quoted:

ART. 93. The secretary of the colonies, who has the power to grant the concession in the cases specified in article 73 of the law, shall immediately advertise the auction of the works for the period of two months, on the basis of the approved plan.

The auction shall take place in accordance with the provisions of article 76 of said law respecting the schedules of rates, the equality of propositions as to the duration of the concession, and with the understanding that in all cases the right of legal preference shall be reserved at the auction to the author of the approved plan, and if the latter should not take advantage of the preference, the successful bidder shall pay him within one month the value of the plan, in accordance with the appraisal made.

The term "approved plan," as used in the foregoing article, means as follows:

The person desiring to secure a concession allowing the construction of a tramway on a state highroad, prepares the plan and details comprising the general project and submits the same to the secretary of the colonies. The plans are examined by certain specified officers, engineers, and boards, who report thereon to the secretary of the colonies, who considers their reports and approves or disapproves the plan. Among other reports is one showing the estimated cost of constructing the tramway. If the plan is approved, its price or commercial value is fixed by appraisal; that is, the value of the work performed in preparing said plan is fixed. Thereupon the right to carry out the general project in accordance with said approved plan is sold at auction in accordance with the provisions of article 93, as above quoted. In order to secure the right to bid at said auction, a deposit of 1 per cent of the estimated cost must be made by the prospective bidder.

From the documents on file herein it clearly appears that the plan prepared and presented by the Messrs. Usera became an "approved plan" for the construction of the proposed tramway, and that said Messrs. Usera made the required deposit of 1 per cent of \$100,000, the estimated cost of construction.

They therefore owned the plan and were qualified to bid at the auction to be held in accordance with article 93 of the regulations. It does not appear that said auction was ever had or dispensed with. I say "dispensed with," because there may have been some way of avoiding an auction sale, though it has not come to my knowledge. By royal decree, the provincial government in *Cuba* might exempt the letting of contracts for public works of extraordinary urgency from said requirement, but I know of no such provision in regard to tramways in Porto Rico. The Spanish law of railroads in Porto Rico provides a means of securing the right to build a railroad of the kind contemplated herein without a public auction. That method is as follows (Regulations of Railroad Law):

ART. 20. In the case to which the preceding articles refer, namely, when it is a question of a petition for a concession without subsidy, and for which only one proposition shall have been presented, said concession shall be granted without the formalities of public auction; but always by means of a law, as provided for in article 27 of the Law of Railroads.

To this end the secretary of the colonies shall present to the Cortes the proper form of law, accompanied by all the documents mentioned in article 25 of the Law of Railroads and in the corresponding articles of these regulations.

ART. 21. The law to which the preceding article refers being passed, and the bond of 3 per cent of the amount of the estimate being deposited within the time fixed by article 16 of the Law of Railroads, there shall be issued to the interested party, or to the company which may have solicited the concession, the proper instrument, making the contract a public document, and including in it, verbatim, the document of general conditions, the special law of concession, the special and economic conditions, and schedule of maximum rates.

I do not understand that it is claimed that the Spanish Cortes ever passed such special act for the benefit of Messrs. Usera. I am, therefore, of the opinion that Messrs. Usera did not acquire a franchise right to construct said proposed tramway by the proceedings set forth in the documents submitted. They did, however, acquire certain inchoate rights, which are property, and the protection and enforcement of which said property rights are imposed upon the United States by the stipulations of the late treaty with Spain (sec. 8, treaty with Spain, Paris, Dec. 10, 1898). Not only must the United States protect and enforce said property rights, but the treaty provides that the change of sovereignty "*can not in any respect impair the property or rights* \* \* \* of individuals."

The Messrs. Usera, or their assigns, have the right to call for an auction sale of the franchise right, to secure which their proceedings were inaugurated, which said auction must be in accordance with the Spanish law and their rights protected as by that law provided. (*Bryan v. Kennett*, 113 U. S., 179, 192, and cases cited; *Strother v. Lucas*, 12 Pet., 410, 434; *Hornsby v. United States*, 10 Wall., 224, 242.)

This case was referred to the Attorney-General, who concurred in the conclusion that the proceedings under Spanish dominion were not sufficient to create a completed grant; but disapproved the conclusion that the applicants had a right to call upon the military government of Porto Rico to complete the grant. Therefore he advised the Secretary of War as follows (22 Op., 551, 554):

The Messrs. Usera have not a complete and vested franchise or concession for the construction of a tramway from Ponce to Port Ponce, and that the War Department is without power to exercise the prerogatives of the Government to grant or complete such concession.

The matter was disposed of pursuant to the opinion of the Attorney-General.

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**IN THE MATTER OF THE CONTRACT FOR A MARKET HOUSE AT SANCTI SPIRITUS, CUBA, AND THE RIGHTS THEREUNDER OF PRIMITIVO GUTIERREZ, A SPANISH SUBJECT.**

[Submitted May 10, 1901. Case No. 1237, Division of Insular Affairs, War Department.]

The military government having rescinded the order suspending the operation of the contract involved herein, the refusal of the municipal authorities to comply with the demands of complainant creates a controversy ordinarily to be resolved by the courts.

SIR: I have the honor to acknowledge your request for a report on the above-entitled matter; and, responding thereto, I have the further honor to report as follows:

In 1897 the municipality of Sancti Spíritus was indebted to Primitivo Gutierrez in the sum of \$15,582.35 for light furnished to the city during the years from 1878 to 1881, inclusive; and said municipality also desired the erection of a market house for the convenience of the inhabitants of the town.

On September 1, 1897, the municipality entered into a contract with Gutierrez, in which was recited the indebtedness referred to, and by said contract Gutierrez agreed to erect a market house at his own cost according to plans and specifications provided by the municipality, and also to pay the municipality \$1,000 a year for a period of fifteen years, and at the end of that time to turn over the market house to the municipality free from any obligation to him, and to consider the existing indebtedness for lights discharged.

The municipality on its part agreed that, in payment of its existing indebtedness to Gutierrez and for money expended in the construction of the market house, he should be entitled to receive during the life of the contract, for his own use, the rent of spaces and constructions in the market house at and for certain fixed rates and prices; that he should have the right to the rent of certain designated places outside

the market house, and that venders of certain market supplies selling their wares outside the market house should pay him a certain sum per day, and that their sales should be confined to certain hours.

Gutierrez performed the conditions of said contract binding upon him. The market house was erected and the procedure regarding sales entered upon, and Gutierrez began and continued to receive the rents and charges specified in the contract, and to make monthly payments to the municipality.

On the 3d day of April, 1899, an order was issued by Maj. S. B. Stanberry, a military officer of the United States in command at Sancti Spíritus, suspending the contract above referred to.

On the 23d of June, 1899, the general in command of the department of Matanzas rescinded this order, and directed the municipal authorities at Sancti Spíritus to restore Mr. Gutierrez to the enjoyment of the rights and privileges exercised under said contract before the order of suspension was issued. Mr. Gutierrez is now in possession of the market house, but shows to this department that he does not derive a revenue therefrom, or from the privileges conferred upon him by said contract.

His inability to derive such revenue results from the alleged fact that the municipal authorities of Sancti Spíritus refuse to carry out the terms of said contract, and require the venders in market products to confine their business to the market house or to pay Mr. Gutierrez for the privilege of selling their wares in said market house or elsewhere.

Under these conditions Mr. Gutierrez advances a claim for damages as follows:

1. Injury occasioned by the order of the military authorities of the United States suspending said contract.

2. Injury occasioned by the refusal of the municipal authorities of Sancti Spíritus to comply with the terms of said contract.

Mr. Gutierrez now seeks to effect a settlement of all claims arising in this matter by surrendering said contract and conveying said market house to the municipality, and also to release the municipality from the debt due for lighting the city, and in consideration thereof he is to receive the sum of \$62,277.12. This total is arrived at as follows:

Debt due for lighting city for the years between 1878 and 1881, inclusive, as specified in the contract.....	\$15,582.35
Interest at 6 per cent for nineteen and one-half years .....	18,231.33
Actual cost of the construction of the market house.....	22,135.33
Interest one year.....	1,328.11
Money expended in efforts to obtain rescission of military orders and execution of his contract.....	5,000.00
Total .....	62,277.12

If for any reason the proposed settlement can not be effected, Mr. Gutierrez insists that the military authorities of the United States in charge of the government of civil affairs in Cuba shall issue and enforce orders to the municipal authorities of Sancti Spíritus sufficiently drastic to secure him the enjoyment of the benefits claimed under the contract.

The Spanish minister at this capital sustains the claims made by Gutierrez, who is a citizen of Spain. (See Doc. No. 18.)

This matter has been referred to Major-General Wood, military governor of Cuba, and his determination was adverse to the claims made by Gutierrez. (See Doc. No. 13.)

Mr. Gutierrez now applies to the Secretary of War for final determination of the matter.

#### THE ORDER OF SUSPENSION.

Attention is directed to the fact that the alleged invasion of Gutierrez's rights by the military forces of the United States by the order of Major Stanberry suspending the contract has been corrected by the action rescinding said order.

If the order of suspension worked an injury of such kind and character as to create a liability on the part of the United States, such liability arises on unliquidated damages, and the claimant must look to Congress for relief. This department is not permitted to settle, adjudge, or pay such claims.

#### THE REFUSAL OF THE MUNICIPAL AUTHORITIES TO RENDER THE ASSISTANCE NECESSARY TO ENABLE GUTIERREZ TO DERIVE THE BENEFITS CLAIMED UNDER THE CONTRACT.

From the opinion of the Attorney-General as to the construction of sewers and pavements in Habana (Dady & Co.), delivered to the Secretary of War July 10, 1899, the following is quoted:

No one has a right to insist upon the specific performance of a contract for the improvements of streets in a municipality. A city may suspend or entirely abandon a project, although covered by a valid contract, subject only to the right of the contractor, if damaged, to recover just compensation.

Under the rule so announced it would appear that the municipality of Sancti Spíritus had the legal right to refuse to comply with this contract, and that Gutierrez was without the legal right to insist upon the specific performance of said contract or to require the United States to compel the municipality to comply with the terms of said contract.

It appears from the papers that the municipal authorities base their refusal to assist in carrying out this contract on the grounds that the contract is void because it creates a monopoly and operates as a restriction of trade, and therefore violates public policy. This view

of the contract is sustained by Major-General Wood and his cabinet. Mr. Gutierrez objects to the exercise of such power of determination by the military authorities of the United States in Cuba as being in excess of their jurisdiction. From the argument of his counsel (Document No. 21) the following is quoted:

It is respectfully submitted that the contract between Mr. Gutierrez and the municipality of Sancti Spíritus being valid under the laws of Spain and Cuba, it is not within the lawful power of the military authorities of the United States to set that contract aside or to interfere with and prevent its due execution. The assumption and exercise on the part of the military authorities of the United States in Cuba of the power to pass upon, adjudicate, and practically annul Mr. Gutierrez's contract are plainly in violation of the duty specifically imposed upon the United States by the treaty of peace. \* \* \* The Government of Spain would clearly have the right to ask and expect the United States to indemnify its subjects for such a gross and unjustifiable usurpation of judicial authority by a military officer of the United States. (See p. 3, Doc. No. 21.)

Without admitting that the foregoing correctly states the limitations of the powers of the military authorities of the United States in Cuba, it suggests the inquiry as to whether said authorities would have any more right to judicially determine the claims made on behalf of the municipality and render a judgment adverse to the municipality and in favor of Mr. Gutierrez than it would have to judicially determine the matter adversely to the claim advanced by Gutierrez. In other words, can this department act judicially and promote the interests of Mr. Gutierrez if it can not act judicially to his detriment?

But I do not understand that the military authorities of the United States in Cuba have exercised judicial powers in this matter. They have rescinded the order of suspension and placed the parties *in statu quo*. They recognize the right of the municipality to refuse compliance with the terms of the contract by subjecting itself to liability for damages, and relegate the question of such liability to the courts. (See Docs. 13 and 15.)

#### THE ORDER CLOSING THE COURTS OF CUBA TO SUITS AGAINST MUNICIPALITIES.

At present Mr. Gutierrez is prevented from bringing suit to test the liability of the municipality to him by the following order:

HEADQUARTERS DIVISION OF CUBA,  
Habana, March 21, 1899.

On the recommendation of the Secretary of State and Government the military governor of Cuba directs the publication of the following order:

1. The prosecution of all claims against municipalities or provincial deputations will be suspended until the method of their adjustment shall be determined after the reorganization of said corporations.

2. Judges will not take cognizance of suits involving claims against provincial deputations or municipalities for liabilities incurred prior to December 31, 1898, and suits already instituted to establish such claims will be suspended.

ADNA R. CHAFFEE,  
Major-General of Volunteers, Chief of Staff.

Presumably, the reorganization referred to in the foregoing order is that to be accomplished by the election to be held June 16, 1900, when the members of the *ayuntamiento* will be actual representatives of the people.

In so far as this matter presents a judicial aspect, it would seem that the only relief which the military authorities of the United States in Cuba could afford would be to suspend the operation of the order above quoted in this special instance. Whether such suspension shall be made or Mr. Gutierrez required to postpone bringing a suit until the order is revoked is an administrative question to be determined by the Secretary of War, and does not require discussion by the writer.

But the attention of the Secretary of War is directed to the fact that the military government in charge of civil affairs in Cuba is a substitute for the sovereignty which prevailed in the island prior to the establishment of military government by the United States therein, and, as such, is a part of the government of the several municipalities of the island and exercises general supervision and control thereover. It follows that such government may properly prevent the municipal authorities from subjecting the municipality to liability for damages. Therefore the discussion is extended to include this branch of the case that the Secretary of War may be advised as to the situation in regard thereto.

There is a question as to whether the rights secured by the arrangement with the municipality constituted a franchise conferring vested rights, or a simple contract under which the rights were inchoate and dependent upon the continued action of the municipal authorities in imposing restraints upon others desirous of selling market products whereby Gutierrez was able to secure financial benefits. The provisions of the agreement upon which Gutierrez relied for his financial advantage were those whereby the municipal authorities agreed to make it unlawful to sell market products at any point in the city except the market house (sec. 7, contract, Doc. 4), and the provisions to require street venders of fish and other market products to provide themselves with and carry a certificate from Gutierrez that they had paid him a specified sum for the privilege of plying their avocation (sec. 9, Doc. 4); also to oblige the police to render Mr. Gutierrez such assistance as he may need to protect his interests in the streets (sec. 9, Doc. 4).

The complaint now made by Gutierrez is based on the alleged failure of the municipal authorities to comply with these requirements of the contract.

It will be seen that the privileges were conferred by an exercise of the police power of the government. An individual can not secure a vested right to control the exercise of the police power of the State any more than he could secure a vested right to control the operation of martial law. It is a power of which a State can not divest itself.



Undoubtedly the contract involved attempts to secure exclusive rights to Gutierrez, and to that extent creates a monopoly. As to whether or not a monopoly created in Cuba under Spanish dominion is now void, the attention of the Secretary of War is directed to the several opinions rendered by the Attorney-General on the order of Gen. Brooke preventing landing of Commercial Cable Company's cable in Cuba, delivered to the Secretary of War during the year 1899. From the opinion delivered June 15, 1899, the following is quoted: (22 Op. 516.)

The mere fact that the Western Union Telegraph Company is enjoying, under a grant of exclusive right, what amounts to a monopoly is no reason of itself why it should be deprived of its concession. It is easy to say that monopolies are odious, but there are concessions which amount to monopolies which are lawful and can not be disturbed except by a violation of public faith.

\* \* \* \* \*

Concessions of this kind, which carry with them exclusive rights for a period of years, constitute property of which the concessionary can no more be deprived arbitrarily and without lawful reason than it can be deprived of its personal tangible assets. In a case in the Supreme Court of the United States (1 Wall., 352) Mr. Justice Field said:

"The United States have desired to act as a great nation, not seeking in extending their authority over the ceded country to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded."

If, therefore, the Western Union Telegraph Company has an exclusive grant applicable to Cuba for cable rights, which grant has not expired, it would be violative of all principles of justice to destroy its exclusive right by granting competing privileges to another company.

Whether or not said contract is void because of being in restraint of trade is a question which must be determined by existing local conditions. If the trade in market products in the island has heretofore been conducted pursuant to the general plan embraced in the contract and the purpose and result of such contract was to promote said trade according to an established custom and usage, then the contract would probably not be considered as restrictive, since it does not wholly prohibit the trade, but seeks to regulate it.

I incline to the opinion that the provisions of said contract to which Mr. Gutierrez now appeals may properly be considered as having been void from their inception, for the reason that the municipal council which adopted them undertook thereby to restrict subsequent councils and other municipal authorities in the exercise of the police power belonging to the municipality; or, as stated in another form, the municipality is at liberty to exercise and control its police power at all times without regard to the action of former councils in regard thereto. And if it sees fit at this time to exercise such power in a manner different from that contemplated in the contract, it is at liberty to do so.

The holding of this contract void, whether on the grounds of being a monopoly, or in restraint of trade, or as an unwarranted restriction

on the police power, is to be determined very largely by local conditions, as to which this Department is not informed, but in regard to which the military authorities of the United States in Cuba are informed. The military governor having passed upon the question so raised, it must be presumed that in making such determination he considered said local conditions, and presumably such determination is correct.

THE PROPOSAL TO CONVEY THE MARKET HOUSE NOW OWNED BY  
GUTIERREZ TO THE MUNICIPALITY.

It is now proposed by Mr. Gutierrez to bring the entire controversy to a final conclusion by conveying the market house erected by him under said contract to the municipality, free and clear of incumbrances, canceling the contract and waiving all claim for damages thereunder and releasing the city from the debt owed him for lighting. This proposition is to be considered as independent of the contract and standing on its own merits. The questions involved are—

- (1) Does the municipality want the building?
- (2) Are the terms just, reasonable, and satisfactory?
- (3) Does the condition of the public funds and revenues of the municipality warrant the expenditure for such purpose?

In Cuba, as in the United States, market houses are considered public improvements, for the construction of which public funds may be properly used. Whether or not the municipality of Sancti Spíritus is to be permitted to use the public funds at its disposal to secure this market house is an administrative question to be answered by the Secretary of War, and is without the purview of this report.

The condition upon which Gutierrez proposes to convey the market house to the city is the payment to him of \$62,277.12. This total embraces the following items:

For lighting the city from 1878 to 1881, inclusive .....	\$15,582.35
Interest at 6 per cent for nineteen and one-half years .....	18,231.33
Actual cost of construction of market house .....	22,135.33
Interest on above amount for one year .....	1,328.11
Expenses in obtaining rescission of order of suspension .....	5,000.00
Total .....	62,277.12

The attention of the Secretary of War is directed to the fact that the total of the liability of the city for light furnished between 1878 and 1881 is stated in the contract involved herein as being \$15,582.35. The interest charge of \$18,231.33 now presented by Mr. Gutierrez should receive further investigation. Mr. Gutierrez also charges interest for one year on the money expended in the construction of the market house, fixing the sum at \$1,328.11. It appears from the papers on file herein that Gutierrez received revenues pursuant to the conditions of said contract from the 29th day of November,

1898, the date the market house was completed and open for business, until the 3d day of April, 1899, when his contract was suspended. It would seem proper to require him to account to the municipality for the amount so received before allowing him interest on the amount invested. It does not seem proper to require the municipality of Sancti Spíritus to indemnify him for the \$5,000 which he claims to have spent in the effort to obtain a rescission of the military order suspending the execution of his contract. This order was made by a military officer of the United States, and he should look to that Government for the damages occasioned thereby.

The writer is not advised as to the condition of the public funds and revenues of the municipality of Sancti Spíritus, and therefore can not furnish information in regard thereto.

If the Secretary of War shall be of the opinion that the proposal to convey the market house to the municipality, and thereby terminate the controversy, merits consideration and investigation, it is suggested that it would be proper to hold said proposal in abeyance until a municipal council is elected at the forthcoming election, whereupon the matter could be referred to the new council and the subject taken up and investigated by them, the action of the municipality to be subject to the approval of the military government.

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The Secretary of War was of opinion that the military authorities of the United States in Cuba had done all that was incumbent upon them in this matter, and that such matters as are continued in controversy should be determined by the courts of Cuba if the parties to the controversy could not reach an agreement.

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**REPORT ON THE RIGHT OF THE MUNICIPALITY OF HABANA TO EXERCISE OVER PROPERTY OWNED BY SAID CITY THE RIGHTS WHICH BY LAW BELONG TO THE PEACEFUL POSSESSION OF PROPERTY.**

[submitted April 16, 1901. Case No. 3814, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge and comply with your request for a report on a matter arising as follows:

The municipal authorities of Habana, Cuba, seek to enter into an agreement with one Tomas Mazzantini y Equia, as president of the association known as "Fronton Jai Allai," which will permit said association to occupy for a period of ten years a certain piece or parcel of ground owned by the city of Habana, and situate in the block of said municipality comprised between the streets named Concordia, Lucena, Virtudes, and Marqués Gonzales. The contemplated agreement provides that said Mazzantini, at his own expense, shall erect a building

on said ground to be used as a "Fronton," or hand-ball court, wherein the public are to be permitted to play hand ball upon payment of a fee. As compensation for such use and occupation of said land the agreement provides that, at the expiration of said ten years' term, the building so constructed becomes the property of the city of Habana.

As originally drawn, the agreement bound the municipality for a period of ten years to abstain from granting a like privilege of constructing a "Fronton" to any other individual or association. This provision appears to have been eliminated from the agreement, but is understood as being included in the request for a report and will therefore be considered.

It appears that this agreement was first authorized by the municipal council of Habana in April, 1898. This action was ratified and affirmed on March 15, 1900. The contract so authorized was reduced to writing and signed April 27, 1900, and was thereafter presented to the military governor of Cuba for his approval, in compliance with the provisions of paragraph 3, article 81 of the municipal law. Thereupon the question arose—

Does said agreement violate the provisions of the legislation known as the "Foraker amendment?"

The military governor of Cuba refers this inquiry to the Secretary of War, and in his letter of reference sets forth the following:

The municipal council, duly elected by the people, enters into a business arrangement which it deems to be to the advantage of the municipality, and which is to the advantage of the municipality, as it obtains at the end of ten years a building worth about \$8,000 \* \* \*

The whole transaction has been carried on in good faith and I can not believe that it was the intention of the Foraker law to prohibit legitimate transactions of this sort. Under the existing Spanish law the approval of the Governor-General is required, but it is technical. If the Foraker law is to be interpreted as rigidly as within indicated, all business involving municipal as well as all other insular consent is practically at an end.

The attention of the Secretary is called to the fact that a copy of said proposed agreement is not included in the papers submitted, and therefore its provisions can not be stated with definiteness. From the papers submitted it appears that said agreement provides for two separate and distinct matters, although both are involved in one transaction. These matters are—

1. The use and occupation of certain property owned by the municipality.
2. The obligation of the municipality to abstain for ten years from granting similar privileges to others.

The provisions of said agreement relating to the disposition of the property constitute a lease for a period of ten years of property belonging to the city upon terms satisfactory to the parties whose rights are involved. To lease real estate is an ordinary right of a

proprietor. In regard to rights of this character in Cuba, the treaty of peace provides as follows. (Art. VIII):

\* \* \* the relinquishment \* \* \* can not in any respect impair the \* \* \* rights which by law belong to the peaceful possession of property of all kinds of provinces, *municipalities*, public or private establishments, ecclesiastical or civic bodies, or any other association having legal capacity to acquire and possess property in the aforesaid territories.

In addition to stipulating that the "rights which belong to the peaceful possession of property" shall not be impaired, the treaty prescribes a rule of conduct for the United States during the period of occupation. This rule is set forth in Article I as follows:

And as the island (Cuba) is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Since the United States voluntarily consented to be bound by them, it becomes necessary to ascertain what obligations relating to the protection of property and property rights are imposed by international law upon a military force maintaining military occupation of territory.

The governmental forces of the United States (military and civil) now in Cuba are engaged in maintaining an *occupation* of the island and not a *conquest*. *Occupation* is the temporary retention of territory, while *conquest* is the definite appropriation of it. Under the modern law of nations an occupying power is, as stated by Mr. Hall, "forbidden, as a general rule, to vary or to suspend laws affecting property and private personal relations." (Hall on International Law, 4th ed., chap. 4, par. 155.)

Halleck states the law, as follows:

As military occupation produces no effect (except in special cases and in the application of the severe right of war, by imposing military contributions and confiscations) upon private property, it follows, as a necessary consequence, that the ownership of such property may be changed during such occupation, by one belligerent, of the territory of the other, precisely the same as though war did not exist. The right to alienate is incident to the right of ownership, and, unless the ownership be restricted or qualified by the victor, the right of alienation continues the same during his military possession of the territory in which it is situate as it was prior to his taking the possession. A municipality or corporation has the same right as a natural person to dispose of its property during a war, and all such transfers are, *prima facie*, as valid as if made in time of peace. If forbidden by the conqueror, the prohibition is an exception to the general rule of public law and must be clearly established. (Halleck's Int. Law, 3d ed., chap. 33, par. 12, p. 448.)

I do not think the legislation known as the Foraker amendment is to be construed as a prohibition of the right of a municipality to exercise the ordinary rights of ownership or contract. An interpretation thereof which would prevent the municipality of Habana from entering into the agreement under consideration would also preclude the city from entering into agreements for other municipal services, such as cleaning and lighting the streets, employing municipal officers and

agents, constructing public works, or making municipal improvements; for all such agreements create certain rights which are property. Indeed, such interpretation would prevent a private individual as well as a municipality from executing a grant of conveyance of his private property.

I understand the Foraker amendment to be a voluntary renouncement by the United States of the fruits of conquest in Cuba. It restricted the United States to the recent rule of modern times regarding military occupation, and precluded the exercise of the rights over public and private property accorded by the ancient rule to a victor in war who had completed a conquest. By the Teller resolution the United States disclaimed an intention to assume permanent sovereign rights in Cuba, and by the Foraker amendment the United States surrendered the rights of a conqueror and voluntarily limited its authority to that of a temporary occupant under the modern law of nations. As so interpreted the Foraker amendment is in harmony with the treaty of peace and international law; otherwise, it is at variance with both.

Historically, we know that one purpose of the Foraker amendment was to preserve the species of property therein referred to until such time as the rights therein and thereto could be exercised by governmental agencies selected by the inhabitants of Cuba. That purpose is accomplished as to municipal rights and property in Cuba.

To hold that said legislation prevents the municipalities of Cuba from exercising the common ordinary rights of ownership over property which belongs to them is to convert a beneficent measure into an instrument of oppression. The right which the city of Habana seeks to exercise is a personal right appertaining to property of which the city is the absolute owner, and therefore is not subject to the restrictions of said amendment.<sup>1</sup>

## II.

The provisions of the agreement as originally contemplated, creating an obligation of the municipality to abstain for ten years from granting to others a similar privilege for a "Fronton" present another and a different question.

It appears from the papers forwarded to the Department that these provisions have been eliminated. Ordinarily, the attention of the Secretary is not to be directed to such matters; but their consideration affords an opportunity to make a comparison which may elucidate the proposition actually involved.

As already stated, a copy of said proposed agreement has not been forwarded to the War Department. From what appears in the papers submitted, it is difficult to determine whether the agreement was intended to bind the city (1) not to grant to others the privilege of

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<sup>1</sup> See *ante*, p. 374 *et seq.*

maintaining a "Fronton" on *city property*, or (2) not to grant to others the privilege of maintaining a "Fronton" within the limits of the municipality.

In the first instance, the city would exercise a right appertaining to the ownership of property the title of which was vested and complete in the municipality. The rights resulting from such complete and vested title are personal and not subject to withdrawal. They are *vested*.

In the second instance, the city would exercise certain authority appertaining to what is termed the police power of the State. The right of the city to exercise the police power of the State is not a vested right. Nor can it properly be said that the city exercises this power by grant. The power at all times remains in the State and the city exercises it as the agent or representative of the State. The power is political and the authority to exercise it a privilege, dependent at all times upon the continued ability and inclination of the sovereign to permit the city to continue its exercise. It is probable that the Foraker amendment requires the major-general in command of the United States forces in Cuba to prevent the municipalities in the island from exercising the police power of the State in such way as to grant "property, franchises, or concessions;" but I can not believe that it was intended to require such military commander to prevent said municipalities from exercising over property owned by said cities "the rights which by law belong to the peaceful possession of property of all kinds."

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**REPORT ON THE QUESTION OF INSERTING A CHARGE OF "CONSPIRACY" IN THE CRIMINAL COMPLAINTS AGAINST NEELY AND RATHBONE, AND THE INADVISABILITY OF JOINING BOTH DEFENDANTS IN ONE COMPLAINT, WHICH SHALL INCLUDE ALL THE CHARGES.**

[Submitted May 21, 1901. Case No. 2652, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge and comply with your request for a report on certain questions arising in the matter of the criminal proceedings in the courts of Cuba instituted against C. F. W. Neely and E. G. Rathbone, at one time officials in the department of posts, government of Cuba. Said questions are as follows:

1. Should said defendants be charged with conspiracy?
2. Should the criminal prosecutions against these persons be consolidated; that is to say, should they be joined in one information and charged with acting jointly in committing the alleged crimes?
3. Should each and all the acts complained of be included in one complaint or information?

In order that a misunderstanding may not occur, I think it proper for me to state that when this report was requested the Secretary of War informed me that the conduct of said criminal proceedings devolved upon the local authorities in Cuba; that upon them rested the responsibilities arising therein, and they were to exercise a free hand in matters of procedure. Therefore this report, should it come to their notice, is not to be considered as a direction or instruction, but simply as presenting for consideration matters respecting which they are to exercise their own judgment and discretion.

## I.

### SHOULD SAID DEFENDANTS BE CHARGED WITH CONSPIRACY?

If a conspiracy was entered into by Neely and Rathbone, its purpose was to commit a felony. In the proceedings already instituted the contention of the Government is that a felony, or, more accurately, a number of felonies, were actually committed. If the felony is an offense of a higher grade than conspiracy and the trial were had in the United States, a serious question would arise as to whether or not the lesser offense merged in the greater.

Archbold's Criminal Practice and Pleadings (Pomeroy's notes, 8th ed., vol. 2, p. 1836) states the rule as follows:

When a felony or misdemeanor is in fact committed, a conspiracy to commit such felony or misdemeanor can not be indicted and punished as a distinct offense.

In the case of *Commonwealth v. Kingsbury*, Chief Justice Parsons, speaking for the supreme court of Massachusetts, says (5 Mass., 105, 107):

The defendants are charged with conspiring to get possession of the chattels of Thomas Pons, then in his shop, to remove them from his shop, and to conceal them from him, under color of authority from the owner to sell them, and that they in fact carried their conspiracy into execution.

The fraudulently obtaining possession of the chattels of Pons, carrying them away, and secreting them, is unquestionably a felony; and the attorney-general very properly admits it. But he has argued that the conspiracy was a complete offense by itself before it was carried into effect, and therefore is not merged in the felony.

We have considered this case, and are of opinion that the misdemeanor is merged. Had the conspiracy not been effected, it might have been punished as a distinct offense, but a contrivance to commit a felony, and executing the contrivance, can not be punished as an offense distinct from the felony, because the contrivance is a part of the felony, when committed pursuant to it.

The law is the same respecting misdemeanors. An intent to commit a misdemeanor, manifested by some overt act, is a misdemeanor; but if the intent be carried into execution, the offender can be punished but for one offense.

I think the courts of the United States do not now accept the doctrine that conspiracy may merge in *misdemeanor*.

Wright on Criminal Conspiracies says (p. 223):

Another point to be observed is the doctrine of merger, by which is meant that where a conspiracy (which is a misdemeanor) consists of an agreement to commit a



felony and is actually executed, the misdemeanor merges in the felony; but where there is a conspiracy to commit a misdemeanor only, there, even though the conspiracy be executed, there is no merger because the two crimes are of the same rank.

In *People v. Richards et al.*, the supreme court of Michigan say (1 Mann., 217, 222):

It was said in an early case in Massachusetts (*Commonwealth v. Kingsbury*, 5 Mass., 106), that where the misdemeanor or felony is actually executed, the conspiracy is merged and can not be punished. But the case was one of a conspiracy to commit a distinct felony. *It is no doubt the law that if the felony is proved the conspiracy must at once merge.*

In *People v. Mather* (4 Wend., 265), Mr. Justice Marcy, speaking for the court, says:

It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so when the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor, it can not be merged. Where two crimes are of equal grade, there can be no legal, technical merger. (See also, *Lambert v. People*, 7 Cow. (N. Y.), 103; *Com. v. Drum*, 19 Pick. (Mass.), 479; *Com. v. Goodhen*, 2 Mete. (Mass.), 193; *State v. Murray*, 15 Maine, 100; 1 Duvall, 4; 48 Maine, 218; *State v. Noyes*, 25 Mich.; *Hartman v. Com.*, 5 Barr, 60; *Com. v. Delany*, 1 Grant, 224; *Com. v. Parr*, 5 W. and S. (Pa.), 345.)

The doctrine declared by the foregoing authorities has not been universally accepted either in the United States nor England. (*United States v. Rindskopf*, 6 Biss. (U. S.), 259; *Reg. v. Rowlands*, 5 Cox Crim. Cas. (Eng.), 497, note.)

But the courts which deny the doctrine deprecate the practice at variance therewith. In the United States *v. Rindskopf* (ante) the court said:

In *Reg. v. Boulton* (12 Cox Cr. Cas., 87) in court of queen's bench, before Chief Justice Cockburn, in 1871, although the course of receiving proof of the commission of the substantial crime is not regarded as satisfactory, yet it is decided that such a course is legal, and in that case, it being a charge of conspiracy to commit a felonious crime, proof of the commission of the crime itself was allowed. The chief justice cited and relied upon the authority of the late Lord Cranworth in *Reg. v. Rowlands* (5 Cox Cr. Cas., 497, note). In that case the parties had been indicted, not for the offense they had committed, but for a conspiracy to commit it, and the judge, after stating that *it would have been more satisfactory if the parties had been indicted for what they had done and not for conspiracy to do it*, stated "that the course pursued was no doubt legal, and, being legal," he said, "I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. *It would be much more satisfactory to my mind if parties had been indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal.*" I have quoted this language as expressive of my first view of the question when raised during the trial, and I can say now, as I said then, that *the better way, in my judgment, would have been to have indicted all parties here for the particular offense committed by each*, but under the law it seems I have not the right to say they must be so prosecuted. The course pursued in this matter by the government attorney, in the language of those cases, is "undoubtedly legal," and I can, therefore, only consider the case as it is presented on this indictment.

Being so admonished, there seems little question as to the proper course to be pursued in cases of this character in the United States.

I think the correct rule in the United States is as follows:

The offense of conspiring to commit a felony merges in the offense of doing the felonious act in those States of the Union where the *act* itself is an offense of higher degree than the *agreement* to commit the act, *provided* the offense of conspiring is complete when the agreement is entered into; in States where the offense of conspiracy is not complete until the agreement is entered into *and* an attempt is made pursuant thereto, the act whereby the purpose of the agreement is accomplished may be considered as a part of the original offense and the offending parties punished either for the conspiracy or the felony, possibly for both.

Wright on Criminal Conspiracies says (p. 93):

In some of the States the crime has been made the subject of statutory definition and restriction, in others it rests solely upon the common law as found in the English reports, while by the Revised Statutes of the United States there must be both the corrupt agreement or combination *and* an overt act done in pursuance thereof to make the offense a punishable one.

The Penal Code of Spain continues to be in force in Cuba, as does also the Spanish Code of Criminal Procedure. It is therefore important to consider if said question of merger might arise under said laws. An examination of the penal code in force in Cuba induces the belief that such question would arise and would be equally serious, if not more so, than in the United States. That code clearly distinguishes between an *agreement* or *conspiracy* to commit a criminal act and the *act* itself, and in each instance which has come under my observation that code deals with the conspiracy as an offense of lesser grade than the act itself is declared to be. For example, articles 134, 135, and 136 of said code define the crime of treason and fix the penalty of "*cadena perpetua* to death." The offense of conspiring to commit said treasonable acts is provided against as follows:

ART. 137. Conspiracy to commit any of the crimes mentioned in the three preceding articles shall be punished with the penalty of *presidio mayor*, and the proposition to commit the said crimes with that of *presidio correccional*.

The provisions of said code relating to the crimes of *lèse majesté* furnish another example. They are as follows:

ART. 155. Upon any person who shall kill the King there shall be imposed the penalty of *reclusión perpetua* to death.

ART. 156. If the crime referred to in the following article be frustrated or attempted, it shall be punished with the penalty of *reclusión temporal* in its maximum degree to death.

The conspiracy to execute with that of *reclusión temporal*.

And the proposition with that of *prisión mayor*.

\* \* \* \* \*

ART. 161. He who shall kill the immediate successor to the Crown or the Regent of the Kingdom shall be punished with the penalty of *reclusión temporal* in its maximum degree to death.

If the crime be frustrated or attempted, with the penalty of *reclusión temporal* to death.

The conspiracy with that of *prisión mayor* in its medium and maximum degrees.

And the proposition with that of *prisión correccional* in its maximum degree to *prisión mayor* in its minimum degree.

Articles 237 to 243 define the crime of rebellion and prescribe the penalty therefor. For many such acts the penalty is "*cadena perpetua* to death."

Article 244 deals with agreements to commit rebellion as follows:

ART. 244. Conspiracy to commit the crime of rebellion shall be punished with the penalty of *prisión correccional* in its medium and maximum degree.

The proposal to do so shall be punished with that of *reclusión temporal* in its minimum and medium degree.

From the provisions of said code relating to sedition the following is quoted:

ART. 246. Those who by inciting the seditious and making them resolute shall have promoted and supported sedition, and its principal leaders shall be punished with the penalty of *reclusión temporal*, should they be included in any of the cases specified in the first paragraph of No. 2 of article 172, and with that of *prisión mayor* if they are included in none of these.

ART. 247. Mere participants in sedition shall be punished with the penalty of *prisión correccional* in its medium and maximum degrees in the cases specified in the first paragraph of No. 2 of said article 172, and with that of *prisión correccional* in its minimum and medium degrees if not included therein.

ART. 249. A conspiracy to commit the crime of sedition shall be punished with the penalty of *arresto mayor* to *prisión correccional* in its minimum degree.

That the lesser offense merges in the greater is such an universal rule of criminal jurisprudence that I doubt not it prevails in the jurisdiction of Spain. I have not failed to observe that conspiracy to commit acts constituting treason, lèse-majesté, rebellion, and sedition are subject to penalties similar in character to those prescribed for felonies, although different in extent, and this might be held to prevent merger in cases of conspiracy to commit those particular acts.

Cuba continues to be under the civil law, and the common-law rules respecting conspiracy are not in force therein. Many agreements which might be considered conspiracies under the common law are not amenable to the civil law. Article 4 of the Penal Code in force in Cuba provides as follows:

ART. 4. A conspiracy and proposition to commit a crime are punishable *only in the cases in which the law specially penalizes them*.

There is a conspiracy when two or more persons act together for the commission of a crime and *decide to commit it*.

There is a proposition when the person who has decided to commit a crime proposes its execution to one or more persons.

It becomes important to ascertain if a conspiracy to commit the crime of which Neely or Rathbone stand accused is one "which the law specially penalizes."

If I understand aright, Neely and Rathbone are charged with violating the provisions of one or all of articles 401, 402, 403, and 404 of the Penal Code in force in Cuba, and also section 55 of the Postal Code of Cuba.

Said articles of the Penal Code are as follows:

ART. 401. The public official who by reason of his duties has in his charge public funds or property and who should take or consent that others should take the same shall be punished:

1. With the penalty of *arresto mayor* in its maximum degree to *presidio correccional* in its minimum degree if the amount taken should not exceed 125 pesetas.
2. With that of *presidio correccional* in its medium and maximum degrees if it should have exceeded 125 and did not exceed 6,250 pesetas.
3. With that of *presidio mayor* if it exceeded 6,250 and not exceed 125,000 pesetas.
4. With that of *cadena temporal* if it exceeded 125,000 pesetas.

In any case with that of temporary special disqualification in its maximum degree to perpetual disqualification.

ART. 402. The public official who, through inexcusable abandonment or negligence, should enable the peculation of public funds or property, referred to in Nos. 2, 3, and 4 of the foregoing article, by another person shall incur the penalty of a fine equivalent to the value of the money or property misappropriated.

ART. 403. The official who, to the detriment or hindrance of the public service, shall apply to his own or to foreign purposes the money or property placed under his charge shall be punished with the penalties of temporary special disqualification and a fine of from 20 to 50 per cent of the amount diverted.

If restitution be not made the penalties prescribed in article 401 shall be imposed on him.

If such unlawful use of the funds were without detriment to or hindrance of the public service, he shall incur the penalties of suspension and a fine of from 5 to 25 per cent of the amount diverted.

ART. 404. The public official who shall give to the funds or property that he administers a public application different from that to which they were destined shall incur the penalties of temporary disqualification and a fine of from 5 to 50 per cent of the amount diverted, if detriment to or hindrance of the public service to which they were assigned should result therefrom, and otherwise that of suspension.

Section 55 of the Postal Code is as follows:

Whoever, being a postmaster, assistant postmaster, cashier, or other person employed in or in any way connected with the business or operations of any branch of the service of the department of posts, shall convert to his own use any money, postage stamps, stamped paper, or other property of the department of posts, or in the custody of, or in use by, said department, or postal, money-order, or other funds coming into his hands in any manner whatever, or any money or property which may have come into his possession or under his control in the execution of such office, employment, or service, or under color or claim of authority as such officer, employee, or agent, whether the same shall be the money or property of the department of posts or in the custody of or in use by said department or of some other person or party, or shall fail safely to keep any such money, stamps, stamped paper, postal, money-order, or other funds or other property, whether the same is the prop-

erty of the department of posts or in the custody of or in use by said department, or the property of some other person or party, without loaning, using, depositing in banks, except as authorized by the regulations of the department of posts, or exchanging for funds or property other than such as are especially allowed by the regulations of the department of posts, or shall fail to remit to or deposit at a designated depository, or turn over to the proper officer or officers, agent, or agents any such money, stamps, stamped paper, postal, money-order, or other funds, or other property, whether the same is the property of the department of posts or in the custody of or in use by said department, or the property of some other person or party, when required so to do by law or the regulations of the department of posts, or upon demand or order of the director-general of posts, either directly or through a duly authorized and accredited officer or agent of the department of posts, or shall advise or participate in any of the offenses defined in this section, shall for every such offense be punished by imprisonment for not less than six months nor more than ten years, or by a fine in a sum equal to the amount embezzled, or by both such fine and imprisonment; and any failure to produce any money, postage stamps, stamped paper, postal, money-order, or other funds, or other property whether the property of the department of posts or in the custody of or in use by said department, or the property of any other person or party, when required so to do as hereinbefore provided, shall be taken to be prima facie evidence of such offense. But nothing shall be construed to prohibit any postmaster from depositing, under the direction of the director-general of posts, in a bank designated by the director-general of posts for that purpose, or in any other place, provided the director-general of posts shall so specifically authorize, to his own credit as postmaster, any funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such banks or otherwise, when instructed or required to do so by the director-general of posts, for the purpose of remitting surplus funds from one post-office to another or to a designated depository.

I am unable to find provisions of law either in the Penal Code or Postal Code which specially penalizes an agreement or conspiracy to commit the acts thus declared to be criminal; nor do I find a general provision such as is made by section 5440, Revised Statutes of the United States, as follows:

SEC. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$1,000 and not more than \$10,000, and to imprisonment not more than two years.

Arturo Hevia, deputy public prosecutor in Habana, who appears to have charge of the prosecution, makes a report in regard to the contemplated report. With reference to said report Major Dudley, judge-advocate, Department of Cuba, writes (May 8, 1901):

He agrees that it is not wise to make the charge on "conspiracy" *alone*, but to make *specific* charges against each of the accused, and that is his intention.

My understanding of said report is that the deputy prosecutor intends to file a complaint wherein the offense charged will be a willful doing of an *act* and not a willful participation in an *agreement*. That is to say, the complaint will not charge an offense of which conspiracy is the gravamen.

Apparently it is intended that said complaint shall set forth that an agreement to commit said acts was entered into and said acts committed pursuant thereto, but said facts are to be averred (1) as matters in *aggravation* and (2) as the means or instruments by which the criminal act was done and performed, the offense charged being one or all of the several acts penalized by the provisions of section 55 of the postal code and article 401 of the penal code.

I further understand that said complaint will charge each offense in the alternative; i. e., (1) said act was done and performed by the accused; (2) said act was done and performed by the accused pursuant to an agreement so to do.

In support of this practice of criminal pleading Mr. Hevia refers to certain articles of the Spanish Code of Criminal Procedure, which, as translated in this division, are as follows:

ART. 649. When the oral trial is ordered the case shall be communicated to the fiscal (prosecutor) or to the private accuser, if the crime can not be prosecuted *ex officio*, in order that within the period of five days they may classify the facts in writing. After this classification is made, all the proceedings in the case shall be public.

ART. 650. The classification shall be limited to deciding in precise and numbered conclusions:

1. The punishable facts resulting from the summary investigation.
2. The legal character of said facts and the specific designation of the crime constituted thereby.
3. The participation therein of the accused person or persons, as the case may be.
4. The facts resulting from the summary investigation which constitute extenuating or aggravating circumstances or which may exempt from criminal liability.
5. The penalties which the accused person or persons, as the case may be, have incurred by virtue of their respective participation in the crime.

The private accuser, when there is one, and the prosecuting official, when they bring a civil action shall also state:

1. The amount of damages as estimated by them, caused by the crime or the designation of the thing, and the fact in virtue of which this liability was contracted.

ART. 653. The parties shall have the power to submit upon each of the points which are to be the object of the classification, two or more conclusions in alternative form, so that if from the trial the first should not be proper, any of the others may be considered in the sentence.

ART. 732. After the closing of the evidence the parties shall have the power to modify the conclusions set forth in the classification.

In such case they shall submit in writing the new conclusions and deliver them to the presiding judge of the court.

The conclusions may be prepared in alternative form, as provided for in article 653.

The purpose of averring the existence of the agreement or conspiracy is to insure the competency of certain testimony which the Government intends to offer, and to show premeditation and deliberate contriving, extending over a period of many months, thereby increasing the degree of the offense.

If the intentions of the public prosecutor are as above set forth, they appear to me as entirely proper.

## II.

*Should the criminal prosecutions against these persons be consolidated; that is to say, should the accused be joined in one information and charged with acting jointly in committing the alleged crimes?*

I think this question should be answered in the negative, for the reason that it may be or made to appear that in some instances one or both of the accused acted independently of the other.

This variance between the information and the proof would not be as serious in Spanish jurisdictions as in the United States. Criminal procedure under the civil law is adapted to the rule, Let no guilty man escape, while under the common law the rule is, Let no innocent man suffer. It follows that under the criminal procedure of the civil law the court is permitted to exercise great latitude in matters of procedure, and may permit the complaint to be modified so as to conform to the facts shown to exist (Art. 732, Code Crim. Procedure), while in the United States such authority is not possessed by the judges of criminal courts in trials based on indictments (Ex parte Bain, 121 U. S., 1), for with us indictments are found and presented by grand juries, acting independently of the presiding magistrate. Under the civil law the question presented to the court in a criminal prosecution is, Is the accused guilty of any act penalized by the law? Under the common law the question presented to the court is, Is the accused guilty of the particular offense whereof he stands charged? Hence the difference in the procedure.

I am unable to definitely determine from the report of Mr. Hevia what his intentions are as to this matter. This inability, however, is not to be attributed to the report. Mr. Hevia writes with full knowledge of the criminal procedure and practice in Spanish jurisdictions, and I read in comparative ignorance thereof.

While these prosecutions are to be conducted pursuant to the Spanish law in force in Cuba, it seems desirable that, so far as safely can be done, the procedure should harmonize with American ideas and established practices. Therefore it seems best, if possible, to have the complaint drawn in the first instance so as to avoid the necessity of changing it after the evidence is submitted, reserving, of course, the liberty to exercise the right to change if found desirable.

## III.

*Should each and all the acts complained of be included in one complaint or information?*

I understand from the report of the fiscal, Arturo Hevia, that it is his intention to include all of the acts or offenses in one complaint. If separate complaints are filed against each of the accused, all of the offenses of which the person named is considered guilty will be included in the complaint against him.

The code of criminal procedure in force in Cuba provides as follows:

ART. 300. Every crime of which the judicial authority takes cognizance shall be the object of a summary investigation. *The connected crimes shall nevertheless be included in a single record.*

ART. 17. The following are considered as crimes connected with each other:

1. Those simultaneously committed by two or more persons together whenever said persons are or may be subject to different ordinary or special judges or courts by virtue of the nature of the crime.
2. *Those committed by two or more persons in different places or at different times should there have been a previous agreement regarding the same.*
3. *Those committed as a means to commit others or facilitate the execution thereof.*
4. Those committed in order to secure immunity from other crimes.
5. *The different crimes imputed to an accused at the beginning of the proceeding against him for any of them, should there be, in the judgment of the court, an analogy or relation between them, and not have been so far included in the proceedings.*

In this connection attention is directed to the case of *Pointer v. United States* (151 U. S., 396, 403), wherein the Supreme Court of the United States held:

The provision in Revised Statutes, section 1024, that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated," leaves the court to determine whether, in a given case, a joinder of two or more offenses in one indictment is consistent with settled principles of criminal law, and also free to compel the prosecution to elect under which count it will proceed, when it appears from the indictment or from the evidence that the prisoner may be embarrassed in his defense if that course be not pursued.

Also, the case of *McElroy v. United States* (164 U. S., p. 76), wherein the court say (p. 80):

It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts.

The question which arises in my mind relates to the *expediency* rather than the *legality* of pursuing the course indicated. If all the offenses are included in one complaint and disposed of in one trial, the Government may be placed at a disadvantage for want of certain evidence which could be secured; or matters in defense may be presented which could be overcome if opportunity were afforded. It not unfrequently happens, in the trial of criminal actions in the United States, that the defense finds cause for felicitation in the fact that the prosecution elects to "put all its eggs in one basket," and quite as frequently finds cause for well-merited apprehension when called upon to face a series of indictments and trials. If the law now in force in Cuba permits these offenses to be presented to the courts in several separate com-



plaints, and independent trials may be had thereon, it seems advisable to pursue that course. However, the determination of the several matters herein discussed is to be left, as already stated, to the local authorities of the government of Cuba.

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The Secretary of War transmitted a copy of the foregoing report to the military governor of Cuba inclosed in the following letter:

MAY 23, 1901.

SIR: I herewith transmit the report of the law officer, Division of Insular Affairs, War Department, on certain questions arising in the Neely and Rathbone cases. This report was prepared for my personal use; but it presents matters which I consider of sufficient importance to require consideration by the officials having charge of these prosecutions, and therefore the report is forwarded to you.

While this report is in harmony with the views entertained by me and heretofore communicated to you, I wish it understood that the determination of the questions discussed devolves upon the officials conducting the proceedings, upon whom the responsibilities rest.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

Maj. Gen. LEONARD WOOD, U. S. V.,  
*Military Governor of Cuba.*

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**REPORT AS TO THE OWNERSHIP AND RIGHT TO DISPOSE OF  
VESSELS DISABLED AND SUNK IN THE COASTAL WATERS  
OF CUBA BY THE NAVAL FORCES OF THE UNITED STATES  
DURING THE SPANISH-AMERICAN WAR.**

[Submitted July 18, 1901. Case No. 2797, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge receipt of your request for report on the question of ownership and right to dispose of certain vessels disabled and sunk in the coastal waters of Cuba by the naval forces of the United States during the Spanish-American war.

These wrecks are to be considered from two points of view.

1. As *property* having a market value.
2. As *obstructions to navigation* and therefore *nuisances*.

If said vessels are to be dealt with as property having a marketable value and disposed of by exercise of the rights of ownership, then the attention of the Secretary is directed to the following provisions of section 3755, Revised Statutes of the United States:

The Secretary of the Treasury is authorized to make such contracts and provisions as he may deem for the interests of the Government, for the preservation, sale, or collection of any property, or the proceeds thereof, which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States, and which ought to come to the United States \* \* \* and in such contracts to allow such compensation \* \* \* as the Secretary of the Treasury may deem just and reasonable. No costs or claim shall, however, become chargeable to the United States in so obtaining, preserving, collecting, receiving, or making available property \* \* \* which shall not be paid from such moneys as shall be realized and received from the property so collected under specific agreement.

The Attorney-General in letter to the Secretary of the Navy, dated March 29, 1900, written with reference to the wreck of the *Alfonso XII*, one of the vessels now under consideration, says:

These wrecks all appear to be lying on the shores and in the coast waters of Cuba, and as that island is now within the jurisdiction of the United States under the treaty with Spain and in international law, although temporarily so and by means of a military government, it is my opinion that section 3755 gives to the Secretary of the Treasury complete authority in the premises. \* \* \* Section 3755 undoubtedly \* \* \* extends to the property of private owners which has been wrecked, abandoned, or become derelict, and I do not suppose it would be denied on any ground that the wrecks on the coast of Cuba are the property of the United States as the victors in the war with Spain and in the various engagements in which these vessels were sunk.

In said letter the Attorney-General expresses the opinion that the "Navy Department has neither general nor special authority in law to recover and preserve these wrecks and appurtenances;" and also that the acts of June 14, 1880, and August 2, 1882, making it the duty of the Secretary of War to remove sunken vessels which obstruct the navigable waters of the United States and giving him a certain discretion respecting the sale and disposition of such sunken craft, do not apply to the coast waters of Cuba.

By Department letter dated May 4, 1900, the military governor of Cuba was advised that the War Department purposed to act in accordance with the views of the Attorney-General, and a copy of his opinion was therewith transmitted. On May 9, 1900, the military governor of Cuba returned said letter and requested a reconsideration of the subject. September 15, 1900, the military governor of Cuba addressed a communication to the War Department, in which the general subject is presented as follows:

I have the honor to request a decision on the following subject: There are a number of old wrecks—Spanish war vessels—scattered along the coasts of Cuba which have long since been abandoned and are rapidly rusting out. I believe that some of them could be sold and the island government derive some benefit from such action. I am constantly in receipt of applications in regard to the wrecking, removing, etc., of these derelicts, and respectfully request that authority be allowed to proceed with the work as may seem to the best interest of the public service here.

In order that the Secretary may be fully advised as to the situation in which this matter now stands, it is necessary to direct attention to the proceedings had in the case of the *Alfonso XII*, one of said wrecks. Application was made to the military government of Cuba for the purchase of this wreck. The application was forwarded to the War Department and referred to the Navy Department. The Secretary of the Navy requested the opinion of the Attorney-General and received the letter above referred to, and thereupon informed the War Department that the Navy Department did not have jurisdiction, and advised that the matter be referred to the Treasury Department. (Doc. 5, No. 1705.)

On May 9, 1900, the Secretary of the Treasury advised the Secretary of War as follows:

SIR: I have the honor to acknowledge the receipt from your Department of your indorsement dated the 4th instant, upon a recommendation by the captain of the port of Habana, relative to the steamship *Alfonso XII*, reported to have been wrecked at Mariel, and have to state that this Department will consider a proposition made by the company referred to by the captain of the port in the correspondence, or other reputable company or companies, for the recovery of the property.

The proposition should be so made as to conform to the terms of the law governing such cases, as set forth in the Revised Statutes, and it is suggested that the paper be forwarded through the office of the captain of the port, with such remarks or comments indorsed thereon as he may choose to make.

Respectfully,

L. J. GAGE, *Secretary.*

On July 3, 1900, the Secretary of War addressed the Secretary of the Treasury as follows:

SIR: The military government of Cuba desires to dispose of the wreck of the *Alfonso XII*, a Spanish vessel now lying upon the rocks off the north coast of Cuba, at the entrance of the harbor of Mariel. It is understood that the Navy Department has abandoned all intention of endeavoring to preserve the vessel. I desire to be informed whether you propose, under section 3755 of the Revised Statutes, to make any contract or provision for the preservation or sale of the said vessel. If you do not propose to make such provision, the military government of Cuba will proceed to dispose of the wreck, which has now remained as a serious obstruction to navigation for two years, and which should be removed by some one without further delay.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

In response the Secretary of the Treasury, on July 6, 1900, wrote as follows (Doc. 8, No. 1705):

The Department has been advised that she is of no value except as old iron, and that the wreck is now a dangerous obstruction to navigation. On the 9th of May last the Department advised you that it would consider a proposition by a reputable company or companies for the recovery of the property. Nothing further has been heard of the matter, either through your Department or otherwise.

Under the circumstances this Department has no objection to action in accordance with your suggestion, that the military government of Cuba be allowed to dispose of the wreck, which, as you remark, has now remained as a serious obstruction to navigation for two years and which should be removed by some one without further delay.

On July 5, 1900, the military governor of Cuba was advised as follows:

SIR: Referring to your letter of May 9 last, asking that the wreck of the Spanish transport *Alfonso XII* be placed at the disposition of the island government, I am directed by the Secretary of War to advise you that the Treasury Department having made no objection to such disposition, you are authorized to proceed to the removal of this derelict in the manner you deem proper.

Very respectfully,

CLARENCE R. EDWARDS,  
*Lieutenant-Colonel Forty-seventh Infantry, U. S. V.,*  
*Chief of Division.*

Maj. Gen. LEONARD WOOD,  
*Military Governor of Cuba, Habana, Cuba.*

There the matter rested until April, 1901, when application was made to the State Department by A. Lotinga for the purchase of the wreck of the said *Alfonso XII* and two other wrecks, as follows (Case No. 2797):

86 LEADENHALL STREET,  
London, E. C., April 16, 1901.

The SECRETARY OF STATE,

*State Department, Washington, D. C., U. S. A.*

SIR: During the Spanish-American war the three steamers *Alfonso XII*, *Santo Domingo*, and *Antonio Lopez* were run ashore on the coast of Cuba, and I understand that the wrecks remain on the rocks to this day.

I have friends who would be prepared to purchase same as they lie for breaking-up purposes. I have been in correspondence with this matter both with the Transatlantic Company of Barcelona, formerly owners of the boats, and also with the underwriters, from whom I have received communication that both parties had abandoned the boats altogether. I should feel greatly obliged if you will let me know whether it might be the intention of your Government to dispose of the above-named wrecks, and if so, what steps would be necessary for me to take in the matter.

Waiting the honor of your reply, I remain, sir, your obedient servant,

A. LOTINGA.

The State Department sent copies of this application to the War Department and to the Treasury Department. The Secretary of the Treasury addressed a letter to the Secretary of War, as follows (Doc. 2, No. 2797):

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,  
*Washington, May 6, 1901.*

The SECRETARY OF WAR.

SIR: I have the honor to transmit herewith a copy of a letter from Mr. Alfred Lotinga relative to certain wrecks of Spanish steamers on the coast of Cuba, and will thank you to obtain from the proper authorities of the government in Cuba a report upon the matter.

Respectfully,

L. J. GAGE, *Secretary.*

The matter was referred to the military governor of Cuba, who returned the papers with the following indorsement (4th Ind., No. 2797):

The wrecks in question are the property of the island of Cuba. Arrangements for the removal of the *Alfonso XII* have already been effected, and it is recommended that the parties mentioned correspond direct with the island government relative to others. If their propositions are advantageous they will be given immediate and favorable consideration.

I take the liberty of directing the attention of the Secretary of War to the fact that in addition to the determination of this question of ownership by the Attorney-General, and concurrence in his views by the War, Navy, Treasury, and State departments, the principle involved has been adjudicated by the courts of the United States. The several captures of vessels effected by the naval forces of the United States during the war with Spain were taken into the prize courts, wherein decrees were entered that said vessels should be sold and the

proceeds disposed of as the laws of the United States provided. In none of these cases was it held that the vessels were the prize or property of the military government of Cuba or that said government was entitled to participate in the proceeds of the sale. The rights of the captors are the same whether the prize sinks or continues to float, and I am unable to find authority for the proposition that prize of war, captured at sea, inures to the benefit of the military government of the territory off the coast of which the capture was effected. If, therefore, these wrecks are to be considered as property and dealt with for the sole purpose of enabling the proprietor to realize their *property value*, it appears manifest that the proprietor is *not* the military government of Cuba.

The attention of the Secretary is directed to the question as to the right or authority of the Government of the United States to exercise the powers of a proprietor over said vessels and to sell and convey them. The question involved is: Did the proprietary title to these vessels pass to the United States by the act of capture or destruction? In *Brown v. United States* (8 Cranch, 110) Mr. Justice Story said (p. 148):

Even as to captures actually made under such commissions no absolute title by confiscation vests in the captors until a sentence of condemnation. \* \* \* But until the title should be divested by some overt act of the government and some judicial sentence, the property would unquestionably remain in the British owners, and *if a peace should intervene it would be completely beyond the reach of subsequent condemnation.*

In *Jecker et al. v. Montgomery* (13 How., 498) Mr. Chief Justice Taney, speaking for the court, said (p. 516):

As a general rule it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture by ships of war of the United States, and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship can not, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States. (4 Cr., 293; 7 Id., 423; 2 Gall., 368; 2 Wheat., App. 11, 16; 1 Kent's Com., 359; 6 Rob., 138, 194, 229, 257.)

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and award restitution and damages against the captor, although the seizure as prize was originally lawful, or made upon probable cause.

And the same rule prevails where the sale was justifiable, and the captor has delayed, for an unreasonable time, to institute proceedings to condemn it. Upon a

libel filed by the captured, as for a marine trespass, the court will refuse to award a monition to proceed to adjudication on the question of prize or no prize, but will treat the captor as a wrongdoer from the beginning.

In *The Nassau* (4 Wall., 634), Mr. Justice Davis, speaking for the court, said (p. 640-641):

It is the practice with civilized nations, when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the government of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that a judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property. Until there is a sentence of condemnation or restitution the capture is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

In *Lamar, executor, v. Browne et al.* (92 U. S., 187), Mr. Chief Justice Waite, delivering the opinion of the court, said (p. 195):

Property captured at sea can never be converted by the captor until it has been brought to legal adjudication; and it is his duty, with all practicable dispatch, to bring his prize into some convenient port for that purpose.

The reason for the rule requiring judicial proceedings is that the sea is neutral, and therefore property thereon is not to be considered from its location to be the property of the enemy. The absence of this reason would lead me to the belief that, as to vessels which were avowedly the property of the nation at war or in the military service of said nation, the rule would not apply, and the title would pass upon the capture being completed, were it not for the provisions of section 4613, Revised Statutes of the United States, as follows:

The provisions of this title (*prize*) shall apply to *all* captures made as a prize by authority of the United States, or adopted and ratified by the President of the United States.

The prize laws of the United States were enacted pursuant to authority conferred by the Constitution upon Congress "To \* \* \* make rules concerning captures on land and water."

They provide, among other things, the following:

1. If the United States desires to retain a captured vessel in the Government service, it may do so, whereupon the property is surveyed, appraised, and inventoried, and the proceedings reported to the court having jurisdiction for the protection of the rights of the claimant and captors. The Department to whose use the property is devoted is required to deposit the value thereof with an assistant treasurer of the United States, in whose hands it is subject to the order of the court. (Sec. 4624.)

2. If the United States does not desire to retain the captured vessel in the Government service, but wishes to sell it, the property itself is subjected to the jurisdiction of the court, and upon being adjudged lawful prize of war is sold under a decree of the court. (Sec. 4615.)

3. If the captured vessel or any part of the captured property is not in condition to be sent in for adjudication a survey shall be had thereon, and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which such proceedings are to be had; and such property, unless appropriated for the use of the Government, shall be sold by the authority

of the commanding officer present, and the proceeds deposited with assistant treasurer of United States most accessible to such court and subject to its order in the cause. (Sec. 4615.)

4. If in any case of capture no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any district court as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution. (Sec. 4625.)

As a financial proposition it doubtless would be unprofitable for the United States to institute judicial proceedings to condemn the wrecks under consideration as prize of war. As a legal proposition it is questionable whether such proceedings could be maintained when instituted after the treaty of peace has been ratified and exchanged. (*Brown v. United States*, 8 Cranch, 110, 148, ante.)

Possibly as to such of said wrecks as were the property of the Government of Spain at the time they were wrecked and abandoned the title of the United States is complete, either by the laws of war or the treaty of peace, or both; and if not there is little likelihood that the Government of Spain would assert a claim for compensation were the United States to sell said wrecks. If the Government of the United States shall now sell and dispose of any of these wrecks which at the time the vessels sunk were owned by private parties, without having the wrecks adjudged prize of war, or derelicts, and sold by judicial proceedings, such private owner or some marine insurance company is quite likely to call upon the United States for compensation.

It appears to the writer that if such of these vessels as were owned by private parties are considered as *wrecks* or *derelicts*, it still follows that the title was not divested by the sinking and abandonment:

The title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there, and no other person can acquire such title except by a condemnation and sale in admiralty. (*Murphy v. Dunham*, 38 Fed. Rep., 504; *Baker v. Hoag*, 7 N. Y., 555; *Ang. on Tidewaters*, chap. 10; 1 Bl. Comm., 290-295).

The rule is the same under the laws of Spain in force in Cuba.

The Spanish Code of Commerce provides as follows:

ART. 842. The goods saved from the wreck shall be specially liable for the payment of the expenses of the respective salvage, and the amount thereof must be paid by the owners of the former before they are delivered to them, and with preference to any other obligation if the merchandise should be sold.

The Spanish Code of Civil Procedure provides as follows:

ART. 2122. \* \* \* *Fourth.* The sale of goods saved from shipwreck shall be subject, according to circumstances, to the proceedings mentioned in the foregoing rules. The judge who has ordered their deposit shall order the sale of the same ex officio when proper.

The attention of the Secretary is directed to the advisability of dealing with these wrecks *solely* as obstructions to the navigable waters of Cuba, and therefore *nuisances*.

The military government of the island would then be at liberty to abate such nuisances without regard to the questions of ownership and value. The abatement would be accomplished by an exercise of the police power of a state, pursuant to the right and obligation of the military government to keep free from obstruction the navigable waters subject to its jurisdiction.

The views expressed in the foregoing report were approved by the Secretary of War. The question of dealing with said wrecks as nuisances was referred to the Navy Department and the Treasury Department. Both said Departments informed the Secretary of War that they had no objection to offer to that course being pursued, and thereupon the Secretary of War instructed the military governor of Cuba as follows:

OCTOBER 31, 1901.

SIR: \* \* \* You having reported that said wrecks are serious obstructions to navigation, and their immediate removal desirable, the military government of Cuba is hereby authorized to consider and deal with said wrecks as *nuisances* and abate them by an exercise of the police power of a state, without reference to proprietary rights therein, inchoate or otherwise, or to their property value.

In taking action to abate said nuisances, the military government is authorized to employ persons or concerns who are willing to accept payment for services rendered in removing said obstructions in the values realized from the wrecks. If such course is adopted, a report and accounting thereof should be made to the Secretary of War for transmission to the Secretary of the Treasury; or you are at liberty to summarily destroy said obstructions and charge the expense to the revenues of the island.

I transmit herewith copy of report on this matter by the law officer, Division of Insular Affairs, wherein are set forth the objections to dealing with these wrecks either as prize of war or as derelicts, and the complications and liability which may arise if either the United States or the military government of Cuba shall dispose of these wrecks by an exercise of the rights of a proprietor.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

Brig. Gen. LEONARD WOOD,  
*Military Governor of Cuba, Habana, Cuba.*

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**IN RE REQUEST OF THE MILITARY GOVERNMENT OF CUBA THAT  
THE WAR DEPARTMENT REQUEST THE STATE DEPARTMENT  
TO APPLY TO THE GOVERNMENT OF SPAIN FOR RELEASE FROM  
PRISON OF EULOGIO IDULLA SAEZ.**

[Submitted July 31, 1901. Case No. 3192, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of the papers in the above-entitled matter and your request for a report thereon.

In response, I have the honor to report as follows:

The case is thus: Saez was a soldier in the Spanish army. He came with his regiment to Cuba, where he deserted in 1894. Afterwards he



joined the insurrectionary forces in Cuba. He was taken prisoner by the Spanish forces on the 30th of April, 1896, while participating in an engagement between the Spanish and insurrectionary forces. He was placed on trial before a Spanish court-martial charged with violating the provisions of article 222 of the Spanish military code. On May 4, 1897, he was convicted and sentenced to "*cadena perpetua*" (perpetual chains). He was transported to Spain and incarcerated in a Spanish penitentiary, where he now is.

The Department of State and Government of the island of Cuba is of the opinion that this man is entitled to release from custody by reason of the provisions of article 6 of the treaty of peace (December 10, 1898), and calls upon the War Department of the United States to request the State Department of the United States to make application to the Government of Spain for his release.

The question involved is whether or not this case falls within the requirements of article 6 of the treaty of peace. In the opinion of the writer that question is to be determined by the State Department. If the treaty is being violated, it also devolves upon the State Department to determine what steps, if any, shall be taken in respect thereof.

The only question the Secretary of War is called upon to determine is whether or not he will advance the papers to the State Department. Since the State Department is at liberty to decide for itself whether or not it will present the application to the Spanish Government, there appears to be no objection to transmitting the papers in the case to that Department.

It is incumbent upon the War Department to furnish the State Department all information in the possession of the War Department in regard to said matter which may be of use in determining the question involved.

Article 6 of the treaty of peace provides for the release of persons in prison for political offenses by the following provision:

Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses in connection with the insurrections in Cuba and the Philippines and the war with the United States.

This man was convicted of the offense penalized by article 222 of the Spanish military code, which is as follows:

Whosoever is included in any of the following numbers shall be punished with death, after degradation in a proper case:

1. He who, abandoning his flag, enters to form a part of the enemy's army.
2. He who induces a foreign power to declare war against Spain, or negotiates with said power for such a purpose.
3. He who raises in arms in order to dismember any part of the national territory.
4. Members of all classes of troops, who are not leaders or promoters, taking part in this crime, shall suffer a penalty extending from *cadena temporal* to *cadena perpetua*.

It will be seen that the offense penalized by the foregoing article consists of two acts—first, deserting the flag of Spain, and second,

joining the forces of the enemy. The gravamen of the offense appears to be joining the forces of the enemy. The penalty for desertion alone as prescribed by article 322 is as follows:

On deserting for the first time, without any qualifying circumstances, two or more years of service shall be imposed in time of peace and four years in time of war.

(The service referred to in the foregoing article means service in the army and not penal servitude.)

It appears from the papers herein that shortly after Saez deserted proceedings were instituted against him, in which he was declared in default because he did not enter appearance in the suit and could not be arrested. He was adjudged guilty and condemned to serve two additional years in the military service, pursuant to provisions of article 322. But when he was captured and found to be guilty of joining the forces of the enemy in addition to desertion, that sentence was annulled, and he was tried, convicted, and sentenced under article 222.

It will be seen that the question for the State Department to determine is, Does the act penalized by article 222 constitute a political offense in the sense in which that expression is used in article 6 of the treaty of Paris?

In the transcript of the proceedings transmitted to the War Department reference is made to articles 88, 177, 185, 222, 270, 273, 322 and 610 of the Spanish military code. I transmit herewith the English version of said articles.

**TRANSLATION OF ARTICLES 88, 177, 185, 222, 270, 273, 322, 610 OF THE SPANISH CODE OF MILITARY JUSTICE.**

Arr. 88. The chamber of justice shall be composed of seven advisers (*consejeros*) when it is to pass upon sentences rendered by courts-martial and demand judicial responsibility.

When passing upon other subjects within their jurisdiction five advisers are sufficient.

In the first case at least two shall be graduate attorneys (*togados*), and in the second case the presence of one shall be sufficient, who shall belong to the army or navy, according to the division to which the subject pertains.

In order to take cognizance of matters proceeding from naval courts the chamber should be composed of the general advisers and the attorney of the navy.

In order to take cognizance of matters proceeding from military courts three advisers shall be generals of the army, and an attorney of the same.

In both cases the number shall be completed from among those who have served longest in the other classes which ordinarily compose the chamber.

Arr. 177. The penalties which military courts may impose as chief penalties for crimes included in this law are of two classes—some military and others common.

The military penalties according to their degree of gravity are as follows:

1. Death.
2. *Reclusión militar perpetua.*
3. *Reclusión militar temporal.*
4. *Prisión militar mayor.*

5. Loss of employment.
6. *Prisión militar correccional* from three years and one day to six years.
7. Separation from the service.
8. *Prisión militar correccional* up to three years.

Common penalties in the same graduated order of severity are:

1. Death.
2. *Cadena perpetua*.
3. *Reclusión perpetua*.
4. *Cadena temporal*.
5. *Reclusión temporal*.
6. *Presidio mayor*.
7. *Prisión mayor*.
8. *Presidio correccional*.
9. *Prisión correccional*.

ART. 185. The death penalty shall include military degradation in the cases where the law expressly provides for the same.

When the same is not executed on account of the criminal having been pardoned, it shall include the loss of employment for officers, and for privates expulsion from the ranks of the army with the loss of all rights therein acquired.

The accessory penalties carry with them the penalty of imprisonment.

The penalty of *prisión mayor* and that of *prisión correccional* for more than three years shall carry with them, for officers, separation from the service, and for privates loss of employment and a place in a disciplinary corps for the time which they should afterwards serve in the ranks, discounting for all purposes the period of the sentence.

One sentence imposed upon a criminal shall include the penalties accessory to several punishments, the combined duration of which exceeds three years.

ART. 222. Whosoever is included in any of the following numbers shall be punished with death, after degradation in a proper case:

1. He who, abandoning his flag, enters to form a part of the enemy's army.
  2. He who induces a foreign power to declare war against Spain, or negotiates with said power for such a purpose.
  3. He who raises in arms in order to dismember any part of the national territory.
- Members of all classes of troops, who are not leaders or promoters, taking part in this crime shall suffer a penalty extending from *cadena temporal* to *cadena perpetua*.
4. He who in order to favor the enemy should surrender the force under his command, the town or place confided to his charge, the flag, the commissary or war supplies, or affords the enemy any other means or methods of offense or defense.

5. He who should seduce the Spanish troops, or those in the service of Spain, in order that they pass to the ranks of the enemy or desert their flag in time of war.

6. He who, being in action or about to enter, should flee in the direction of the enemy.

It shall be considered that the flight was in the direction of the enemy when the accused does not prove that the crime committed was a different one.

7. He who directly or indirectly sustains relations with the enemy with regard to the operations of the war.

ART. 270. The military officer who deliberately and without authority assumes or retains a command shall be liable to a penalty extending from *prisión militar correccional* to that of *prisión militar mayor*.

ART. 273. Desertion from the service, treated of in the two foregoing articles, being agreed to by three or more persons, shall be considered as sedition.

ART. 322. On deserting for the first time without any qualifying circumstances, two or more years of service shall be imposed in time of peace and four years in time of war.

ART. 610. When a decision has been reached, the president of the chamber, or the *ponente* in a proper case, shall communicate the same to the recording secretary, in order that he may record it for signature.

This being done, he shall deliver the rulings to the secretary of the council, with certified copies of the same, viséd by the president of the chamber, so that through the president of the council they may be forwarded to the authority charged with the execution thereof.

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The request of the military government of Cuba upon which the foregoing report was made was transmitted to the State Department by the following letter:

JULY 31, 1901.

SIR: I have the honor to transmit herewith the request of the department of state and government of the island of Cuba that the Government of the United States request the Government of Spain to release from imprisonment in a penitentiary in Spain one Eulogio Idulla Saez, who was convicted by a Spanish court-martial in Cuba of having violated the provisions of article 222 of the Spanish military code and sentenced to *cadena perpetua*. The department of state and government of the island of Cuba entertains the view that this case is within the provisions of Article VI of the treaty of peace (1898). Whether or not the United States will assume that position is a question to be determined by the State Department.

I transmit also a copy of the report hereon by the law officer of the division of insular affairs, setting forth the provisions of the Spanish law under which Saez was tried and sentenced, and other matters connected therewith not fully appearing in the documents received from Cuba.

This Department will be pleased to receive an expression of your views on this subject for communication to the military government of Cuba.

Very respectfully,

WM. CARY SANGER,  
*Acting Secretary of War.*

THE SECRETARY OF STATE.

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**IN RE NOTE FROM THE SPANISH MINISTER AT THIS CAPITAL TO THE SECRETARY OF STATE, SUGGESTING THE CONCLUSION OF AN AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF SPAIN IN RESPECT OF THE DISPOSITION OF THE STATIONARY BATTERIES, WAR MATERIAL, ETC., LEFT BY THE FORCES OF SPAIN IN CUBA AND PORTO RICO, UPON THE FAILURE OF THE MIXED EVACUATION COMMISSIONS TO AGREE AS TO THE TITLE AND FINAL DISPOSITION THEREOF.**

[Submitted February 1, 1900. Case No. 1164, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your request for a report on the matter referred to in the letter of the Spanish minister at this capital addressed to the Secretary of State, under date January 19, 1900, a copy of which was transmitted by the Secretary of State to the Secretary of War, with a request for a statement of the views of the Secretary of War in regard to said matters.

In compliance with said request I have the honor to report as follows:

In his letter to the Secretary of State the Spanish minister, by order of the Government of Spain, directs the attention of the United States Government to the fact that the mixed evacuation commissions, which arranged the terms of the evacuation of Cuba and Porto Rico by the Spanish forces, were unable to agree as to the final disposition of certain stationary batteries, war materials, and other objects in said islands, and an agreement was entered into that said property should remain in the custody and possession of the United States authorities until the two Governments should reach a definitive conclusion in regard thereto.

The negotiations of the peace conference at Paris (1898) were conducted simultaneously with the proceedings of the evacuation commissions at Habana. During the negotiations at Paris the Spanish peace commission proposed the settlement of the question of ownership of these properties situated in Cuba, Porto Rico, the Philippine Archipelago, and Guam. The American commission declined said proposal *in toto* as to property in Cuba and Porto Rico, it being a question as to which "they were not authorized to treat," and as to war material in the Philippines the American commission stated that such material should be governed by the same conditions as were agreed to by the evacuation commissions in the West Indies. As to war material situated in the Philippines and Guam, the American commission subsequently agreed that such material of certain designated kind and character should remain the property of Spain. (See message from the President to Congress, January 4, 1899, transmitting treaty of peace with Spain, and protocols of the conference at Paris; Senate Doc. 62, part 1, Fifty-fifth Congress, second session, pp. 228, 229.)

This agreement of the American commission relating to the Philippines and Guam was incorporated in the treaty of peace as Article V thereof.

Upon Manila being evacuated by the Spanish and occupied by the Americans the Spanish officials laid claim, on behalf of Spain, to several pieces of property which the American officials felt bound to refuse recognition on behalf of the United States.

The negotiations contemplated by the agreements of the peace commissions and evacuation commissions have not yet been initiated, and the purpose of the letter of the Spanish minister is to ascertain if the United States Government is now prepared to enter upon such negotiations.

The negotiations when entered upon will be between the Government of Spain on the one hand and the Government of the United States on the other. As to the disputed property in Porto Rico, the Philippines, and Guam, the United States will be called upon to maintain its own rights as a proprietor. As to the disputed property in

Cuba the position of the United States will be practically the same during its negotiations with Spain, the question as to the disposition of said war material by the United States after the claims of Spain thereto have been adjusted being one to be settled by the United States hereafter.

Under these conditions it seems to the writer that the negotiations are properly within the jurisdiction of the State Department, and that the purpose of the Secretary of State in transmitting the letter of the Spanish minister and asking for the views of the Secretary of War on the subject-matter of the letter was to learn—

1. If the War Department had any objections to carrying out the existing agreement to attempt an amicable settlement by negotiations between the two Governments. In other words, are there military reasons or other reasons known to the Secretary of War for the United States continuing to hold possession of said property without regard to the rights of ownership?

2. Is the War Department now prepared to furnish the *data* requisite to a proper presentation of the claims of the United States?

For the proper determination of these questions it is necessary that the Secretary of War be accurately advised as to the exact property, now in the possession of the United States, to which Spain lays claim.

It would seem manifestly just and proper that the Government of Spain should furnish the United States with a list of the property claimed before a determination was made by the United States as to whether or not it was prepared to enter upon the presentation of the case.

Such list would be of advantage to the United States for the further reason that the claims of ownership and right of possession asserted by the Government of Spain are controverted as to certain properties by municipalities and individuals in several instances. The municipalities claiming that the property was purchased or constructed with municipal funds and belonged to the municipalities under the Spanish law; and many of the harbor works are claimed by local boards of harbor works as private property belonging to them in private right and not by virtue of any official relation to the Spanish Government. If the claims made by these third parties are well founded, their rights should be respected, and under the conditions existing their protection devolves upon the United States.

In order to ascertain what these rights are, it is necessary to know on what the Government of Spain rests its claim of title. It would greatly aid the War Department in investigating the claims of third parties if it were informed as to the facts of the original acquisition and subsequent dealing with the property by the Government of Spain.

I suggest that the Spanish Government be requested to inform the United States Government upon what facts it bases its claim to proprietary rights, including possession of the disputed property.

For the convenient reference of the Secretary of War I have attached copies of the following:

1. Extract from cablegram sent by American evacuation commission to Adjutant-General Corbin for the President, stating position taken and reply of President sustaining the American commission. Also extract from note of American commission to Spanish commission. (Exhibit A.)

2. Article III of the agreement for evacuation, referring the disputed questions to the two Governments, and the dispatch to Adjutant-General Corbin for the President, with reference thereto. (Exhibit B.)

3. Extract from protocol No. 19, December 5, 1898, proceedings of peace conference at Paris. (Exhibit C.)

4. Article V of treaty of peace with Spain (1898). (Exhibit D.)

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#### EXHIBIT A.

[Extract from cablegram to Adjutant-General Corbin for the President, stating position taken by American commission, and reply thereto.]

Fourth. That under Spanish law, all movable things constructed or destined for permanent use or service, of immovable property, become immovable property, and fortifications and fixed batteries are immovable property, that therefore guns and their mountings and other things intended for permanent use or service of such fortifications are necessarily fixtures and hence immovable property, and likewise machinery and other like fixtures in navy-yards or arsenals.

In reply thereto, the following message was sent:

General Wade, *Habana*:

Your message of October 5 giving the differences between the Spanish commissioners and yourselves is received. Their claims are wholly inadmissible, and yours are in strict accordance with the protocol and the instructions heretofore given and must be adhered to.

WILLIAM McKINLEY.

H. C. CORBIN, *Adjutant-General*.

(See pp. 74 and 75, Proceedings of the Commissioners, on file in War Department.)

Thereupon the American commission sent a communication to the Spanish commission, from which the following is quoted:

Fourth. Under the law, all movable things constructed or destined for permanent use or service, of immovable property, become immovable property. Fortifications and fixed batteries are immovable property, and therefore guns and their mountings and other things intended for permanent use or service of such fortifications and batteries are necessarily fixtures and hence immovable property, and likewise machinery and other like fixtures in navy-yards or arsenals, and shears on the docks of Habana are of this class of property, and being attached to the soil and under the law immovable property, Spain has no right to dismount and remove the same and any part thereof. (Ibid., 76.)

#### EXHIBIT B.

[Cablegram to Adjutant-General Corbin for the President, and article 3 of convention for evacuation.]

HABANA, *November 16, 1898.*

General CORBIN, *Washington*.

For the President: In joint session this morning the two commissions agreed upon January 1, 1899, as date for completion of final evacuation of Cuba by the forces of

Spain, or sooner if possible. Provision made for residence of such Spanish troops as for unavoidable reasons can not be embarked at an earlier date. Agreement also made as to what Spanish troops shall carry with them. But in matter of fixed property irreconcilable differences heretofore existing still continue, making agreement impossible. Both commissions agree to refer question to their respective Governments, status quo ante to be preserved by Spanish authorities pending final decision in matter. Particulars of whole subject of agreement by mail.

WADE, *Chairman.*

CLOUS, *Secretary.*

ARTICLE III. An irreconcilable difference existing between the commissioners of the Government of the United States and the commissioners of the Government of Spain, respectively, parties to this agreement, as to the disposition of the public property of Spain in the island of Cuba, and the adjacent Spanish islands, consisting:

First. Of artillery in fixed batteries and fortifications, the fixtures and other property thereto belonging, as heretofore inventoried, under the direction of the aforesaid commissioners, by Lieut. Col. Joaquin Ramos, of the Spanish army, and Capt. J. C. W. Brooks, United States Volunteers.

Second. Of the machinery and fixtures and other property and material of war heretofore in dispute in the "maestranza," in the "pirotecnia militar," and in the "arsenal" in Habana, and of other military and naval property of a fixed character in barracks, hospitals, quarters, and other buildings; and

Third. Of the real estate and public buildings on said islands belonging to or under the control of Spain.

It is agreed by the aforesaid commissioners, respectively, that in respect to said property the statu quo ante shall be preserved until the existing differences concerning the disposition of said property shall have been finally settled by the proper authorities, and the aforesaid commissioners of Spain do hereby agree that the said property shall, pending such settlement, be securely kept and not disposed of in any manner.

Done at Habana, in duplicate, in English and Spanish, by the undersigned, who have hereunto set their hands and seals the 16th day of November, 1898.

(See page 117 Proceedings of Evacuation Commission, on file in War Department.)

#### EXHIBIT C.

With regard to the return of the war material in Cuba and Porto Rico not disposed of by the evacuation commissions, the American commissioners declared that they were not authorized to treat.

With respect to the war material in the Philippines, the American commissioners stated that it should be governed by the same conditions as were agreed to by the evacuation commissions in the West Indies.

The President of the Spanish commission and his colleagues maintained that the cession of the archipelago did not carry and could not carry with it anything except what was of a fixed nature. They explained the character of the siege artillery and heavy ordnance which the Americans claimed for themselves, and after some discussion to the end of determining precisely what each commission understood as portable and fixed material, it was agreed that stands of colors, uncaptured war vessels, small arms, guns of all calibers, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds belonging to the land and naval forces shall remain the property of Spain; that pieces of heavy ordnance, exclusive of field artillery, in the fortifications shall remain in their emplacements for the term of six months, to be reckoned from the ratification of the treaty; and that the United States might, in the meantime, purchase such material from Spain, if a satisfactory agreement between the two Governments on the subject should be reached.



## EXHIBIT D.

The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them.

Spain will, upon the exchange of the ratifications of the present treaty, proceed to evacuate the Philippines, as well as the island of Guam, on terms similar to those agreed upon by the commissioners appointed to arrange for the evacuation of Porto Rico and other islands in the West Indies, under the protocol of August 12, 1898, which is to continue in force till its provisions are completely executed.

The time within which the evacuation of the Philippine Islands and Guam shall be completed shall be fixed by the two Governments. Stands of colors, uncaptured war vessels, small arms, guns of all calibers, with their carriages and accessories, powder, ammunition, live stock, and materials, and supplies of all kinds belonging to the land and naval forces of Spain in the Philippines and Guam remain the property of Spain. Pieces of heavy ordnance, exclusive of field artillery, in the fortifications and coast defenses shall remain in their emplacements for the term of six months, to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the meantime, purchase such material from Spain if a satisfactory agreement between the two Governments on the subject shall be reached.

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The Secretary of War approved of the view expressed in said report, that the proposed negotiations would not be within the jurisdiction of the War Department. He further approved of the suggestion that the State Department be requested to call upon the Government of Spain for an itemized statement of the property claimed. The State Department was so advised, and subsequently received the desired statement from Spain and transmitted it to the War Department. Thereupon the statement was forwarded to the military authorities of the United States in Cuba and Porto Rico for report. The reports being received were transmitted to the State Department, wherein the negotiations with Spain are now pending. (See files in office of Adjutant-General, U. S. A., War Department.)

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**THE CONCESSION TO CANALIZE THE MATADERO RIVER FROM  
THE CRISTINA BRIDGE TO THE BAY OF ATARES.**

[Submitted August 28, 1899. Case No. 771, Division of Insular Affairs, War Department.]

## SYNOPSIS.

1. The concession to canalize the Matadero River from the Cristina Bridge to the bay of Habana at the Atares Cove, granted by order of Captain-General Blanco, dated September 28, 1898, to Messrs. Manuel Gomez de Arango and Felipe Pelaez de Amigo, is *prima facie* a lawful and existing concession, conferring rights, privileges, and benefits as therein set forth.
2. The Habana Canal Company appears to be the present owner of said concession, and as such is *prima facie* entitled to exercise the rights and enjoy the privileges and benefits thereby created.

3. Said recognition of said concession as *prima facie* lawful and existing shall not be construed as conclusive as to the lawful character of said concession nor as to the fact of its legal existence. Nor shall such recognition prejudice the rights of any person, public or private, which are in any way injuriously affected by said concession or by the exercise of privileges or powers claimed under said concession.
4. The courts of Cuba are not bound in any way by such recognition of said concession as *prima facie* lawful and existing, but shall in all cases wherein the court has jurisdiction consider questions relating to said concession without reference to said recognition.
5. The exercise of the rights claimed under said concession shall be subject to the direction and control of the provisional government in all matters relating to the public health and welfare, or other necessity requiring the exercise of the police power of the State.

The Matadero River runs through a portion of the municipality of Habana. The cove of Atares is a portion of Habana Harbor.

On August 31, 1896, Messrs. Felipe Pelaez de Amigo and Manuel Gomez de Arango applied to the Spanish captain-general, the governor of the island of Cuba, for a concession authorizing them to construct a canal in said river from the place where the Cristina bridge crosses said stream to the bay of Atares, and also to authorize the use by them of the lands owned by the Crown of Spain along the proposed route of the canal for the purposes of said canal and on which to erect buildings, wharves, and other structures. The application proceeded on its way through the various official channels, was the subject of many reports, and finally, on September 28, 1898, Governor-General Blanco, by a decree issued by him as governor-general of the island, authorized Messrs. Pelaez and Gomez de Arango to construct said canal, and granted them the use of the public land necessary for the enterprise within a zone of 20 meters on each side of the canal, under certain conditions set forth in the decree of concession.

This concession has been purchased by the Habana Canal Company, a corporation, which now desires to exercise the rights therein provided, and makes application to the provisional government in charge of civil affairs in Cuba for permission so to do. The governor of the island, Major-General Brooke, forwards the matter to this Department for determination.

At the threshold of this investigation there is met the report of Brigadier-General Ludlow, the governor of the province of Habana, as follows (see letter dated June 17, 1899):

It will be noted that the proposed work affects what is recognized as the most dangerous locality in the harbor, involving as it does the disturbance of a mass of putrescible material which has accumulated in the Matadero Creek and the head of the bay during a century or more. The handling of this material and its disposition are matters having serious relation to the question of the public health, and what might be deemed almost excessive precautions are essential unless grave peril is to be incurred. In addition to this, the work provides for the filling in of the low lands

adjacent to the channel, and this work likewise, unless conducted with a full recognition of the responsibility for the results that may ensue, is attended with the danger of creating an immediate and possibly continuing source of infection.

The governor of the island, Major-General Brooke, indorses Brigadier-General Ludlow's report, as follows:

Particular attention is invited to the remarks of General Ludlow regarding the danger which will attend this work. I am satisfied his statements are correct. (See indorsement June 24, 1899.)

Mr. Attorney-General Griggs, in a letter to this Department of date July 10, 1899, discusses the claim of Michael J. Dady & Co., that said company has an existing contract with the city of Habana to construct a system of sewers and pave the streets for said city, and also the demand made by said corporation to be allowed to proceed with the performance of said contract, which permission had been refused by Brigadier-General Ludlow, the governor of the province, and the refusal sustained by the governor of the island, Major-General Brooke. In said letter the Attorney-General says: (22 Op., 529.)

The practical question for the military authorities in Habana is whether it is advisable, as a public matter, and having in mind solely the public interests, to permit a contract \* \* \* which involves the tearing up and disturbance of the streets of the city in a manner which may greatly endanger the public health, to be carried on at the present time. If the authorities were convinced that Michael J. Dady & Co. had a vested right or a complete contract, it would be within their lawful province to suspend its execution, if they thought the public health or other interests required.

In the same way the rights of the parties claiming under this concession, whatever they may be, are suspended, if the exercise of said rights endanger the public health. The Habana Canal Company recognizes this limitation and professes entire willingness to perform the work at a time and in a manner to meet the approval of the Government authorities.

The canal company desires that a determination be had at the present time upon its application for recognition of the concession and rights claimed thereunder by the company. The company desires to be advised as to its situation, that further expenditure may be avoided if recognition is refused, or that the necessary provisions be made to perform the work in the winter season, or as soon as the permission of the proper authorities can be secured.

It seems to be conceded that the work for which this concession provides will, when accomplished, be of great value to the public, both in business and sanitation. Regarding the Matadero Creek, Major-General Brooke says in his indorsement on Brigadier-General Ludlow's letter:

I \* \* \* believe a large proportion of the unsanitary condition of the harbor is due to the polluted deposits emptied into it from this stream, into which the offal from the slaughterhouse has been thrown for many years. This has been stopped, and dredging is now in progress.

The canal company claim that by confining the water of the creek within the banks of a canal the force of the current will be increased, the filth of years scoured out the channel, the deposit of filth at the mouth of the stream lessened if not removed, and the formation of such deposits hereafter prevented. The stream will then drain the swamps adjacent thereto, and the "filling up" of the lowland will also be of great advantage.

If the canal company are allowed to do this work under said concession, it will be without expense to the Government. The compensation to be received by the company is the right to use certain lands, now of such character and condition as to be of little if any use.

The decree confirming the grant not being signed and promulgated at the time the agreement evidenced by the protocol of August 12, 1898, was entered into, could said grant be perfected thereafter by action of the Spanish Crown or its officers?

In *Harcourt v. Gaillard* (12 Wheat., 528) the court say:

War is a suit prosecuted by the sword, and *where the question to be decided is one of original claim to territory*, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations.

This case is cited to direct attention to the rule where war is waged to decide a controversy between conflicting claims to the same territory. Where the title of the sovereign in possession is admitted, and the war is waged to compel him to cede his title or relinquish it, the rule is different, and such sovereign may convey his property during the war so long as he prevents his adversary from securing possession thereof, and the conveyance is made in good faith and not for the purpose of preventing his adversary from securing said property. (Hall's Int. Law, 3d ed., vol. 2, chap. 33, secs. 23, 24, 25.)

That the United States considered the title to public property in Cuba to be in the Crown of Spain is shown by the provisions of the treaty of peace (Paris, 1898), as follows:

ART. 8. \* \* \* Spain relinquishes in Cuba \* \* \* all the buildings \* \* \* and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain.

The United States dealt with Spain, in negotiating the late treaty of peace, as a proprietor, not a pretender, and required Spain to relinquish a title, and not simply a *claim* of title. If Spain were possessed of title to relinquish in December, 1898, it possessed such title prior thereto and might transfer the same if acting in good faith.

As to individual rights, a treaty is considered as dated at its ratification. (*Haver v. Yaker*, 9 Wall., 32; *United States v. Arredondo*, 6 Pet., 748, 749; *United States v. Sibbald*, 10 Pet., 313, 323.)

Did the Crown of Spain complete the grant of the concession claimed herein prior to the relinquishment of property rights to the public domain in Cuba?

The beneficiaries under the concession claim a complete franchise. There is on file with the papers herein a written opinion by Juan F. O'Farrill, the city attorney of Habana, holding that the decree of the governor-general granting the concession is null and void.

The questions presented are questions of law. They relate to rights of property, both real and personal. Their determination is properly a matter for the courts and not for this Department. The courts of Cuba are open and resorted to for the purpose of adjudicating legal questions. Those courts are familiar with the Spanish laws, decrees, customs, and traditions under which the concession was applied for and by which the question of the legality of the grant must be determined. Eventually the rights claimed under the grant involved herein must meet the tests of the Courts of Cuba relieved of the presence of the provisional government now existing in the island. Why not refer them to the courts at this time?

The courts of Cuba are without jurisdiction to pass upon the abstract question of the validity of this concession upon the same being presented to them independent of an actual case pending. But said courts have jurisdiction to pass upon actual controversies involving the question under consideration.

If the exercise of rights claimed under this concession interferes with rights claimed by the city of Habana or the owners of the property adjacent to the stream to be canalized, then an action can be instituted in the courts and the entire matter adjudicated.

As to grants of land by the previous sovereign in territory acquired by the United States, and the faith and credence to be given them, the United States Supreme Court say:

The law presumes the existence in the provinces (of Spain) of an officer authorized to make valid grants. (Mitchel et al. v. United States, 9 Pet., 715, 760.)

The acts of public officers in disposing of public lands, by color or claim of public authority, are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it and deny the power by which it is professed to be granted. Without the recognition of this principle there would be no safety in title papers, and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments, but in all the question is, on whom the law throws the burden of proof of its existence or nonexistence. A grant is void unless the grantor has the power to make it, but it is not void because the grantee does not prove or produce it. (United States v. Arredondo, 6 Pet., 691, 728.)

We have frequently decided that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it. (United States v. Peralta, 19 How., 343, 347.)

This rule or its application by the courts may be modified by legislative enactment and has been changed as to our Court of Private

Land Claims. (Act App. March 3, 1891, Stat. L., vol. 26, p. 854; *Hayes v. United States*, 170 U. S., 637, 647; *Ely's Adm'r v. United States*, 171 U. S., 220, 223-224.)

I am of the opinion that the proper rule for the provisional government of Cuba to adopt, is that announced by the Supreme Court of the United States as the one to be followed in the absence of a statute.

The United States Congress placed restraint upon the provisional government now in charge of civil affairs in Cuba by the following enactment:

That no property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States.

The treaty of peace with Spain (Paris, December 10, 1898) provides that, as to Cuba—

The United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property. (Art. 1.)

And also to see—

That the relinquishment \* \* \* can not, in any respect, impair the property or rights which, by law, belong to \* \* \* associations \* \* \* or private individuals. (Art. 8.)

Obviously the wise course is to proceed through the courts, and allow them to pass upon the claims of rights and privileges whenever it is possible. To do this it is necessary to afford recognition in the sense of permitting the exercise of rights which *prima facie* appear to be existing.

The proceedings upon which this concession is based were instituted August 31, 1896. Notice of the application was duly published in the Official Bulletin. Thereafter the project pursued the course prescribed by law and was submitted to and received the approval of the provincial and superior boards of public works, the local provincial and superior board of health, the board of harbor improvements, the chamber of commerce, the superior navy and harbor masters' council, the military engineer corps, the city corporation civil government with provincial consulting board, the general staff of the military government, and the cabinet of the insular government.

On September 16, 1897, the chief engineer of the province submitted his report, incorporating therein an account of the proceedings, including the favorable reports above-mentioned, and advised the granting of the concession upon terms contained in his report.

On October 1, 1897, the governor of the province of Habana certified to the captain-general of the island that all necessary steps had been taken and the requirements of the law fulfilled. Thereafter remained but the signing of the final order by the captain-general. The final order was signed September 28, 1898, and published in the Official Gazette October 23, 1898.

In reference to the validity of a Spanish grant of land in Florida, our Supreme Court say:

It was done also on the deliberate advice of an officer responsible to the Crown, which makes the presumption very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done. (*Mitchel v. United States*, 9 Pet., 711, 742.)

Under the provisional government maintained in the island by the United States the proceedings in this matter have been as follows: The present secretary of public works directed the concessionnaires to make the deposit required by Article VI of the concession, which direction has been complied with and the deposit made with the present secretary of the treasury of the island and a receipt given therefor. Thereupon the secretary of public works ordered the chief of engineers to restake and lay out the lines of the canal, which was done, and his report thereon submitted to the secretary of public works, by whom it was approved and ordered filed. Thereupon the company commenced work upon the proposed improvement.

The United States Supreme Court say:

It is doubtless true that a change of sovereignty implies a revocation of the authority vested by the prior sovereign in local officers to dispose of the public lands. And yet we think that rule is not controlling in this case, for the new sovereign made an order continuing the functions of the local officers, and one of those local officers making a sale in accordance with the provisions of the prior laws caused the money received therefrom to be paid into the treasury of the new sovereign, and that sovereign never returned the money thus received nor challenged the validity of the sale thus made. This is not a case in which the local officers attempted to dispose of public lands in satisfaction of obligations created by the former sovereign, but one in which a sale was made for money, and that money passed into the treasury of the new sovereign.

It would seem not unwarranted and unreasonable to refer to the familiar rule that where an agent, even without express authority, makes a sale of the property of his principal, and the latter with full knowledge receives the money paid on account thereof, his retention of the purchase price is equivalent to a ratification of the sale. We do not mean, however, to state this as a general proposition controlling all municipal and governmental transactions, but as only one of the circumstances tending to strengthen the conclusion that these acts of the intendant were not mere usurpations of authority, but were in the discharge of duties and the exercise of powers conceded to belong to his office. (*Ely's Adms. v. United States*, 171 U. S., 231, 232.)

It therefore seems proper for this Department to instruct the governor of the island of Cuba—

1. That the concession to canalize the Matadero River from the Cristina Bridge to the bay of Habana, at the Atares Cove, granted by order of Captain-General Blanco dated September 28, 1898, to Messrs. Manuel Gomez de Arango and Felipe Pelaez de Amigo, is *prima facie* a lawful and existing concession conferring rights, privileges, and benefits as therein set forth.

2. That the Habana Canal Company appears to be the present owner of said concession, and as such is *prima facie* entitled to exercise the rights and enjoy the privileges and benefits thereby created.

3. That said recognition of said concession as *prima facie* lawful and existing shall not be construed as conclusive as to the lawful character of said concession, nor as to the fact of its legal existence; nor shall such recognition prejudice the rights of any person, public or private, which are in any way injuriously affected by said concession or by the exercise of privileges or powers claimed under said concession.

4. The courts of Cuba are not bound in any way by such recognition of said concession as *prima facie* lawful and existing, but shall in all cases wherein the court has jurisdiction consider questions relating to said concession without reference to said recognition.

5. The exercise of the rights claimed under said concession shall be subject to the direction and control of the provisional government in all matters relating to the public health and welfare or other necessity requiring the exercise of the police power of the state.

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The Secretary of War approved the views expressed in the foregoing report, and thereupon the military governor of Cuba was advised as follows:

WAR DEPARTMENT,  
Washington, October 5, 1899.

SIR: I have the honor to acknowledge a communication from you of date June 14, 1899, by which you forwarded to this office copy of the concession granted to Messrs. Pelaez and Gomez by the Spanish governor-general on September 28, 1898, authorizing them to construct a canal in the Matadero River from Cristina Bridge to the Bay of Atares, and which concession has been acquired by the Habana Canal Company.

The Secretary of War has approved the findings made by the law officer of the Division of Customs and Insular Affairs in regard to said franchise, as follows:

1. That the concession to canalize the Matadero River from the Cristina Bridge to the Bay of Habana at the Atares Cove, granted by order of Captain-General Blanco, dated September 28, 1898, to Messrs. Manuel Gomez de Arango and Felipe Pelaez de Amigo, is *prima facie* a lawful and existing concession conferring rights, privileges, and benefits as therein set forth.

2. That the Habana Canal Company appears to be the present owner of said concession, and as such is *prima facie* entitled to exercise the rights and enjoy the privileges and benefits thereby created.

3. That said recognition of such concession as *prima facie* lawful and existing shall not be construed as conclusive as to the lawful character of said concession nor as to the fact of its legal existence. Nor shall such recognition prejudice the rights of any person, public or private, which are in any way injuriously affected by said concession or by the exercise of privileges or powers claimed under said concession.

4. The courts of Cuba are not bound in any way by such recognition of said concession as *prima facie* lawful and existing, but shall, in all cases wherein the court has jurisdiction, consider questions relating to said concession without reference to said recognition.



5. The exercise of rights claimed under said concession shall be subject to the direction and control of the provisional government in all matters relating to the public health and welfare or other necessity requiring the exercise of the police power of the state.

I also inclose a copy of the opinion rendered by Judge Magoon, to which your attention is invited.

Very respectfully,

G. D. MEIKLEJOHN,  
*Acting Secretary of War.*

Maj. Gen. JOHN R. BROOKE,  
*Governor-General of Cuba, Habana, Cuba.*

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**IN THE MATTER OF THE SPANISH CONCESSION TO CANALIZE  
THE MATADERO RIVER FROM THE CRISTINA BRIDGE TO THE  
BAY OF ATARES.**

[Submitted May 3, 1901. Case No. 771, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge and comply with your request for a report on the questions involved in the above-entitled matter upon a second consideration thereof by the Secretary of War.

Upon the face of the papers and proceedings involved in the grant of the concession by the Spanish authorities, it appears that the grant is a completed one, duly and regularly issued.

The proceedings by which this concession was secured were initiated August 31, 1896, and on September 28, 1898, the decree granting the concession was signed by the Spanish governor-general of the island. In addition a showing is made that at the time of the evacuation of Habana by the Spanish forces, the concessionnaire was in possession of property and exercising rights under the concession. The military occupation of Habana by the forces of the United States being established, the concessionnaire undertook to continue the exercise of the rights apparently granted by the concession, whereupon the military government prohibited such exercise. This action resulted from attention being called to the fact that the final act in the proceedings relating to the grant of the concession, i. e., the signing of the decree by the Spanish governor-general, took place on September 28, 1898, which was after the peace protocol of August, 1898, had been signed. This raised the question, Had the sovereignty of Spain the authority to grant a concession in Cuba during the time elapsing between the signing of the peace protocol and the definite conclusion of the terms of peace?

In addition to the foregoing, the claim was made to the military government that under the Spanish system it was necessary for the Cortes to pass a special law authorizing a concession of this character before it could be granted; that no such law had been enacted as to this concession, and therefore the decree was null and void. This raised the question: Was the action of the Spanish governor-general

in issuing said decree in excess of his authority under Spanish law? Major-General Brooke, then in command of the Division of Cuba, on June 14, 1899, forwarded the matter to the War Department "for decision in regard to the doubt as to its validity."

The questions above stated are questions of law, and as involved herein relate to a claim of property rights asserted by a private person or concern. The matter coming on for consideration by the Secretary of War, the first thing to be determined was whether the executive branch of the military government of civil affairs in Cuba should exercise judicial functions and determine the questions *judicially*. The exercise of judicial powers by officers of the executive branch of Government is repugnant to the established ideas and institutions of the United States; and the repugnancy is increased when the executive branch is being administered by the military arm of the government. It is not to be denied that under the law of military occupation the commander of the occupying force may exercise all powers of government, including the judicial powers. If it be granted that the military governor of Cuba may exercise judicial powers, it does not follow that he is required to exercise them on any and every occasion which may arise, or at all times when application is made to him for such exercise. As understood by the writer, the administrative policy regarding the exercise of judicial power by the executive branch of the military government of Cuba is that such authority shall be exercised only as necessity requires and prudence dictates, and whenever a controversy between individuals respecting property rights can be relegated to the courts such disposition should be made of it.

In pursuance of this policy, examination was made of this controversy to ascertain if adequate means were available for testing the questions involved in the courts of Cuba. It was fully understood that there were no courts of the island having jurisdiction to pass upon the validity of the concession *as an abstract proposition*. That is, there were no courts into which the concessionnaire could go and exhibit the concession and without other or different procedure secure a judicial determination of the question. Is this concession valid? But it does not follow that there is no method known to the Spanish law, nor procedure to the courts of Cuba, by which jurisdiction may be secured and judicial determination made of that question by the judicial branch of the government of Cuba.

Under Spanish law the courts of Cuba possessed jurisdiction to hear and determine actions arising on trespass; on implied contract to pay for use and occupation; on forcible entry and detention, and other actions of like character. They were also authorized to order restitution of property, of which the owner had been unlawfully deprived or dispossessed.

It appeared certain that the rights provided for in the concession could not be exercised without interfering with rights claimed by some individual, association, corporation, board, municipality or other branch of the government. If so, upon the commission of an overt act, an action in the courts for damages or restitution would lie. In such action the concessionnaire would attempt to justify by pleading the concession. Thereupon the court would have jurisdiction to determine the question of the validity of such concession.

It was with reference to this view of the matter that the first report hereon set forth that—

The courts of Cuba are without jurisdiction to pass upon the abstract question of the validity of this concession upon the same being presented to them independent of an actual case pending. But said courts have jurisdiction to pass upon actual controversies involving the question under consideration.

If the exercise of rights claimed under this concession interferes with rights claimed by the city of Habana, or the owners of the property adjacent to the stream to be canalized, then an action can be instituted in the courts and the entire matter adjudicated.

Under Spanish dominion, and I think under the present government of Cuba, if the executive branch of the government had exercised the judicial powers belonging to it and judicially determined that said concession was valid, the courts of the island would be bound by such determination. It was not thought necessary or expedient to thus dispose of the matter. The situation did not require it. Major-General Brooke found the concessionnaire at work on this undertaking and ordered him to quit, and the question was: Should that order be rescinded? In explanation of his order suspending the work, Major-General Brooke stated that the doubt as to the validity of the concession arose from the fact that the final act consummating the grant was performed after the protocol of August, 1898, was signed. The question thus presented was one of *administrative policy* rather than of *law*. The question was: Shall the military government of Cuba arbitrarily declare that each and every concession made by Spanish authority in Cuba, which was not absolute and complete when the protocol of August, 1898, was signed, shall be considered null and void?

When any administrative policy for the government of Cuba comes on for consideration, the first inquiry is as to the rule in regard thereto established by the laws of war and of nations. This course would be pursued in the absence of treaty stipulations requiring it; but by the treaty of peace with Spain (Paris, 1898), the United States bound itself to—

assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property. (Art. I.)

Being bound to follow the rule established by international law, it became necessary to ascertain what the rule is.

If the war between Spain and the United States had been waged to settle conflicting claims to territory, the rule would be as declared by the United States Supreme Court in *Harcourt v. Gaillard* (12 Wheat., 528), wherein the court say:

War is a suit prosecuted by the sword; and *where the question to be decided is one of original claim to territory*, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations.

But when the title of the sovereign in possession is admitted and the war is waged to compel him to cede his title or relinquish it, the rule is different, and such sovereign may convey his property during the war so long as he continues in possession thereof and the conveyance is made in good faith, and not for the purpose of preventing his adversary from securing said property.

This rule was deduced by the writer from the discussion of the subject in Halleck's *International Law*. Since the correctness of the rule is denied by the officials of the military government of Cuba, said discussion is quoted in full, as follows (see Halleck's *Int. Law*, 3d ed., vol. 2, chap. 33, sections 23, 24, 25):

§ 23. But if war be declared and actually commenced, and one of the belligerents has made manifest his intention to effect the permanent acquisition of a particular portion of the territory of the other (which intention is afterwards accomplished by actual conquest), and after the declaration of such intention, and while preparation is being made to carry it out, the original owner alienates that territory, in whole or in part, is the conqueror bound to regard such alienation as a valid transfer, or may he disregard it *in toto* as being an illegal attempt to deprive him of the rights of war? In other words, did not his avowed determination to effect the permanent acquisition of such territory, his preparation to make the conquest, and his ability to effect it, as proved by the result, give the conqueror some inchoate or inceptive right to the territory subsequently conquered; or did they not at least suspend the right of the original owner to alienate it? In order to obtain a satisfactory solution of this question we will recur to fundamental principles. The rights of conquest are derived from *force* alone. They begin with possession and end with the loss of possession. The possession is acquired by force, either from its actual exercise or from the intimidation it produces. There can be no antecedent claim or title from which any *right* of possession is derived, for if so it would not be a *conquest*. The assertion and enforcement of a *right* to possess a particular territory do not constitute a *conquest* of that territory. By the term conquest we understand the *forcible* acquisition of territory admitted to belong to the enemy. It expresses, not a *right*, but a *fact*, from which rights are derived. Until the fact of conquest occurs there can be no rights of conquest. A title acquired by a conquest can not, therefore, relate back to a period anterior to the conquest. That would involve a contradiction of terms. The title of the original owner prior to the conquest is, by the very nature of the case, admitted to be valid. His rights are, therefore, suspended by force alone. If that force be overcome, and the original owner resumes his possession, his rights revive and are deemed to have been uninterrupted. It, therefore, can not be said that the original owner loses any of his rights of sovereignty or that the conqueror acquires any rights whatever in the conquered territory anterior to actual conquest. The former are suspended by and the latter derived from the *fact* of conquest, and in order to determine the fate of such suspension or acquisition of rights we must refer

to the fact of conquest and not to any prior intention or determination of the conqueror. If these propositions be true, it follows that grants to individuals made after the commencement of hostilities by the original sovereign of lands lying in territory of which he still retains the dominion and ownership rest upon the same foundation as those made before the war. If the title thus conveyed is by municipal law complete and perfect the land becomes private property and must be so regarded by the conqueror. If it be inchoate and imperfect, but *bona fide* and equitable, it nevertheless constitutes "property" in the sense in which that term is used in international law. It is true that by the extreme rights of war the conqueror may disregard individual ownership and take private property and convert it to his own use. But such a proceeding, as has already been said, is contrary to modern practice and can not be resorted to except in particular cases and under peculiar circumstances. As neither actual hostilities nor a formal declaration of war can suspend or terminate the sovereignty of the original owner, he retains and may exercise his dominion over every portion of his territory till actual conquest. (Citing Bouvier, *Law Dictionary*, verb. "Conquest;" Phillimore, *On Int. Law*, vol. iii, § 223; Vattel, *Droit des Gens*, liv. ii, ch. xiii, § 197.)

§ 24. But suppose that the vanquished power, while the conqueror is actually taking forcible possession of a part of its territory, should send its agent with the retreating army, and, as the hostile force advances its standard from district to district, should deliver to individual subjects title deeds of the territory at the moment it was about to fall into the possession of the advancing foe, with the evident intention to deprive him of the fruits of his conquest. Must the conqueror recognize such grants as valid; and, if not, how shall he draw the line of distinction between them and other titles issued by the same authority after the commencement of hostilities and before actual conquest? The want of good faith on the part of such grantees, as well as on the part of the grantor, would deprive them of the rights of *bona fide* purchasers. The distinction between such titles and those acquired in good faith and granted in good faith, and in the ordinary exercise of the rights of original sovereignty, is abundantly manifest. The *fraudulent intent* vitiates the entire transaction, and renders the titles mere nullities, and the conqueror, both during military occupation and after complete conquest by the cessation of hostilities, may refuse to recognize them, unless by some expressed treaty stipulation he has agreed to regard them as valid. But it must be observed that the same rule applies to grants made prior to the war; if not *bona fide*, the conqueror is not bound to recognize them as valid. The fact of the conqueror being in possession of a part of the country, or even of its capital, produces no effect upon the part which remains in the possession of the former sovereign. This question has been discussed in another section. (Citing *Mass v. Riddle & Co.*, 5 Cranch R., 357.)

§ 25. Again, suppose a belligerent should, after a declaration of war, and in anticipation that a particular portion of its territory will necessarily fall into the power of the other party, transfer it to a neutral for the manifest purpose of depriving his enemy of an opportunity to acquire it by conquest; is the latter bound to recognize the validity of such transfer? Every sovereign and independent State has an undoubted right to alienate any part of its own territory, so long as it retains the ownership and dominion; and other sovereign States have an equal right to acquire such ownership and dominion by any of the modes recognized in international law. But a mere treaty cession of a province or territory by one power to another, can never operate, by itself, as an immediate and complete transfer of the ownership and dominion of the land, or of the allegiance of its inhabitants. To produce such effect a solemn delivery of the possession by the ceding power and an assumption of the dominion and government by that to which the cession is made are indispensable. Until then the territory continues to belong to the original sovereign owner, and its

inhabitants remain the subjects of the power to which their allegiance was due prior to such treaty cession. Such ceded territory is, therefore, still liable to conquest as the territory of the enemy. But suppose the transfer be completed by a formal delivery of the possession to the neutral grantee, and the assumption by him of the dominion and government of the ceded territory? If the transaction is evidently *mala fide* and the transfer is made with the manifest intent to defraud the belligerent of the rights of conquest, the pretended ownership of the neutral sovereign will not be recognized by the conqueror. Moreover, such an attempt on the part of a neutral to hold territory for the benefit of one of the parties to a war, and in fraud of the belligerent rights of the other party, is regarded as a violation of neutral duty, and as an act of hostility toward the party whose rights he thus attempts to defeat. Such transfers of territory by a belligerent to a neutral are mere nullities, for fraud vitiates the transactions of States as well as of individuals. But the general right of neutrals to purchase the property of belligerents, *flagrante bello*, if the sale be *bona fide*, is universally conceded. The character of each transaction must be decided upon its own merits, and the determination of the question belongs to the political power of the State. Although the transfer may have been made with the evident intent to defraud the belligerent of the rights to which he is entitled by the laws of war, nevertheless policy may induce him to treat it as a *bona fide* transaction, rather than involve himself in hostilities with the pretended purchaser. (Citing Heffter, *Droit International*, § 131; Duer, *On Insurance*, vol. i, pp. 437, 438; the "Fama," 5 *Rob.*, 97; the "Johanna Emelia," 29 *Eng. Law and Equity*, R., 562; Cushing, *Opinions of Attys. Gen.*, vol. vi, p. 638.)

Between August 12, 1898 (the date the protocol was signed), and January 1, 1899 (the date Spain formally withdrew from Cuba), every act of the then government of Cuba (outside of the municipality and possibly the province of Santiago) was done and performed as an exercise of the sovereignty of Spain, just as the grant of this concession was an exercise of the sovereignty of Spain. If it shall now be established that the right of Spain to exercise the powers of sovereignty in Cuba terminated upon the protocol being signed, the door is opened for complications of a serious character and far-reaching effect. I think it is much better to hold that during this period Spain might properly exercise sovereign rights in Cuba for all legitimate purposes of government, and that the grant of a concession is one such legitimate purpose, unless the transaction is tainted with a fraud upon the United States or the people of Cuba, in whose behalf the United States is acting.

The purpose of the protocol of August 12, 1898, was to secure a cessation of hostilities until such time as a definite treaty of peace could be concluded. With this end in view, the protocol fixed the basis upon which the negotiations for a permanent peace should be conducted. It was an armistice rather than a treaty, created by the war power of the nation and not the treaty-making power, and therefore neither required nor received the approval of the treaty-making power. The thing which the protocol definitely accomplished was to suspend hostilities. Therefore said protocol provided:

ART. VI. Upon the conclusion and signing of this protocol hostilities between the two countries shall be suspended \* \* \*. (30 Stat. L., 1743.)

The protocol plainly contemplates that Spanish sovereignty over and title to Cuba were matters to be disposed of by subsequent action of another body, and therefore recites and provides as follows:

Having in view the establishment of peace between the two countries \* \* \*

Arr. I. Spain will relinquish all claim of sovereignty over and title to Cuba.

This stipulation of said protocol did not have the effect of transferring Spanish sovereignty and title: first, because such effect was not contemplated; second, because M. Jules Cambon, ambassador extraordinary and plenipotentiary of the Republic of France at Washington, was not competent to make the conveyance, and Hon. William R. Day, Secretary of State for the United States, was not competent to accept such conveyance; third, both the United States and Spain subsequently dealt with the matter in the conference at Paris as being subject to the jurisdiction of that body.

At the conference in Paris the United States negotiated with Spain for something more than a peace. The United States dealt with Spain as though that Government possessed both sovereignty and property in Cuba, and required Spain to "withdraw" the one and "relinquish" the other.

That the United States considered the title to public property in Cuba to be in the Crown of Spain as late as December, 1898, is shown by the provisions of the treaty of peace (Paris, 1898), as follows:

ART. 8. \* \* \* Spain relinquishes in Cuba \* \* \* all the buildings \* \* \* and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain.

The United States dealt with Spain, in negotiating the late treaty of peace, as a proprietor, not a pretender, and required Spain to relinquish a title and not simply a *claim* of title. If Spain were possessed of title to relinquish in December, 1898, it possessed such title prior thereto and might transfer the same if acting in good faith.

If it be conceded that upon the condition of war prevailing or the protocol being signed Spain ceased to possess the rights of recognized, permanent sovereignty in Cuba, it must be admitted that Spain might exercise the rights of a belligerent in such portions of the island as were occupied by the Spanish military forces. Habana was so occupied at the time this concession was formally issued.

The attention of the Secretary is directed to the fact that up to this point the purpose of the investigation, both in the first report and in this, is to ascertain the *rights of Spain* and not to determine the rights of the concessionnaire.

Having reached the conclusion that Spain *might* have completed the grant of a concession in Habana on September 28, 1898, the question arose: Did Spain do so? That is to say: Were all the requirements of the Spanish law fulfilled? This was the question which it was thought advisable to refer to the courts of Cuba for judicial determination.

In order that a case might arise over which the courts of Cuba would have jurisdiction, it was necessary that an overt act should be committed. The commission of such overt act was prevented by the military order; and before such act could be committed, it was necessary to revoke the order. In considering the advisability of such revocation it became necessary to ascertain what, if any, show of authority for the performance of the act was made. Manifestly the act, being in derogation of the rights of others, must be performed under a claim of right and such claim evidenced by something more than mere assertion; otherwise the military government in discharge of the ordinary duties of a policeman or other custodian of the peace could not permit the contemplated action. To satisfy this requirement the party interested produced a concession, due and regular in form, and upon its face appearing to create and grant the right asserted. This instrument being produced, the inquiry arises: What credence is to be given such apparently completed grant?

It will be recalled that Louisiana, New Mexico, and California were Spanish provinces shortly before they passed to the United States, and that East and West Florida passed directly from Spain to the United States. Naturally it was to be expected that this question must have arisen in those territories, and received consideration in our courts. Such is the fact.

The United States Supreme Court say:

The law presumes the existence in the province (of Spain) of an officer authorized to make valid grants. (*Mitchel et al. v. United States*, 9 Pet., 715, 760.)

The acts of public officers in disposing of public lands, by color or claim of public authority, are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it and deny the power by which it is professed to be granted. Without the recognition of this principle there would be no safety in title papers, and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments, but in all the question is on whom the law throws the burden of proof of its existence or non-existence. A grant is void unless the grantor has the power to make it, but it is not void because the grantee does not prove or produce it. (*United States v. Arredondo*, 6 Pet., 691, 728.)

We have frequently decided that the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it. (*United States v. Peralta*, 19 How., 343, 347.)

Having reached the conclusion that the showing made as to authority for asserting a claim of right to commit the proposed overt act, was sufficient to justify the military government in refraining from exercising the powers of a guardian of the peace and preventing the commission of such overt act, it was necessary to ascertain if the party



seeking to commit the act was the party entitled to assert such rights as might be derived from the concession.

Upon due consideration the Secretary of War disposed of the several matters involved, over which he thought best to exercise jurisdiction, by directing the military government to deal with said concession on a basis as follows:

1. That the concession to canalize the Matadero River from the Cristina Bridge to the bay of Habana at the Atares Cove, granted by order of Captain-General Blanco, dated September 28, 1898, to Messrs. Manuel Gomez de Arango and Felipe Pelaez de Amigo, is *prima facie* a lawful and existing concession conferring rights, privileges, and benefits as therein set forth.

2. That the Habana Canal Company appears to be the present owner of said concession, and as such is *prima facie* entitled to exercise the rights and enjoy the privileges and benefits thereby created.

3. That said recognition of such concession as *prima facie* lawful and existing shall not be construed as conclusive as to the lawful character of said concession nor as to the fact of its legal existence. Nor shall such recognition prejudice the rights of any person, public or private, which are in any way injuriously affected by said concession or by the exercise of privileges or powers claimed under said concession.

4. The courts of Cuba are not bound in any way by such recognition of said concession as *prima facie* lawful and existing, but shall in all cases wherein the court has jurisdiction consider questions relating to said concession without reference to said recognition.

5. The exercise of rights claimed under said concession shall be subject to the direction and control of the provisional government in all matters relating to the public health and welfare, or other necessity requiring the exercise of the police power of the state. (See letter dated October 5, 1899, to Major-General Brooke.)

From the inception of military government in Cuba, the War Department has deferred to the laudable desire of the inhabitants of the island that the affairs of their civil government should be conducted in Cuba and by officials who were on the ground and to whom access could be had. Pursuant to this policy the Secretary of War refrained from making an order removing the injunction imposed by the requirement of the military government that work under said concession should cease, and confined himself to communicating instructions, leaving to the military government the performance of such acts as were required to carry out said instructions. In this instance the necessary action was to remove the bar of the order, and thereafter refrain from interfering with the attempt of the concessionnaire to proceed, at his peril, to construct said work.

I feel quite sure that if these directions had come into the hands of an American lawyer, practicing his profession in the United States and having in mind the legal procedure of this country and not that of another, he would have easily recognized the purpose of said directions and readily followed the course indicated thereby. But, as already stated, under the Spanish juridical system the usual and ordinary procedure herein would have been to apply directly to the superior authority of the executive branch of the government for

recognition of the concession and had the matter summarily disposed of in one way or the other. It is proverbial the world over that members of the legal profession are conservative; they respect precedent and hold tenaciously to established forms, practices, and procedures. I can readily understand that Spanish lawyers and American lawyers who have become familiar with the long-established precedents of the Spanish procedure and are called upon to deal with affairs in Cuba would hardly understand the advisability of adopting an indirect method of ascertaining a legal fact when a direct means was available; or why the Spanish precedents should not be followed, since it was conceded that the military governor had the authority to exercise judicial powers. To a Spanish lawyer the refusal of an executive officer to exercise judicial powers is as extraordinary as the exercise of such powers by an executive officer is to an American. When this case was returned to Cuba the military governor referred the matter to the secretary of public works, José R. Villalon, who, viewing the matter from the Spanish standpoint, arrived at the conclusion that the Secretary of War had exercised judicial powers and had judicially decreed that said concession was *prima facie* a valid one. Mr. Villalon was further of opinion that the courts of Cuba lacked jurisdiction to pass upon the question of validity and that such jurisdiction belonged to the executive branch of the government of the islands, and more especially to the office of secretary of public works; and thereupon he declared the concession valid. From his report the following is quoted (see letter dated November 19, 1900, Doc. No. 38):

From the opinion of the law office of the Insular Division of the War Department, which is adopted by the Secretary of War as the opinion of the Department, the Habana Canal Company is acknowledged the *prima facie* owner of the concession, and the concession claimed by it is declared to be *prima facie* a lawful and existing concession conferring the rights, privileges, and benefits as set forth therein. \* \* \*

A *prima facie* right has the force of an undisputed right until declared to be null by the proper authority.

The opinion of Judge Magoon, adopted as the opinion of the War Department, is in error in suggesting that the validity or nullity of the concession can be determined by the courts of Cuba. Undoubtedly the courts of the United States have such power within their jurisdiction, but the Cuban courts were never given and have not any jurisdiction to qualify a concession as valid or null. The decision lies with the superior authority in each specific instance.

\* \* \* \* \*

However, I, who under the law am the person to decide the validity of the concession, am not only of the opinion that it is valid, but also that the works proposed are advantageous to the public interests, and I recommend that the petition be granted. \* \* \*

Secretary Villalon is in error in attributing the force and effect of a judicial decision to the conclusions reached by the Secretary of War. The conclusions and directions go no further than to advise the officials of the military government how their discretionary powers are to be

exercised or not exercised in order that the questions of law involved may be judicially determined. This course is identical with that suggested by Attorney-General Griggs July 10, 1899, in the instance of the Torre Plá concession for a street railway in Habana. In that case the Attorney-General said (22 Op., 520):

The question therefore presented is whether either of these claimants has such a *prima facie* vested and regular concession as to entitle it to be permitted to proceed and build the railways. (P. 524.)

I think this fact gives to the owners of the Torre concession a *prima facie* right to proceed under their concession. (P. 525.)

Upon the whole, I am of opinion that the rights disclosed by the owners of the Torre concession are such as entitle them to be permitted, under the permission of the municipal authorities, to proceed with the beneficial work which they desire to construct without the injunction of the military authorities. This will not interfere with an adjudication in the courts of the ultimate and final rights of the parties. The action of the military authorities in withholding permission to proceed with the work is tantamount to a preliminary injunction in a court of law. Applying the same principles that would be applied in such a case if it was in a court of equity, I can see no reason why the owners of the Torre concession should not be permitted at their own risk to proceed with the work which they desire to construct, and I so advise you. (P. 526.)

If Secretary Villalon, in saying that the courts of Cuba "have not any jurisdiction to qualify a concession as valid or null," means that said courts can not pass upon a concession which has been declared valid or null by the executive branch of the Government, or that said courts can not pass upon a concession as an abstract proposition when not involved in an actual case pending before them, I agree with him; but I can not agree that in the absence of a determination by the executive branch, and in a controversy actually pending between private parties involving personal or property rights, the courts of Cuba are without jurisdiction to determine whether or not a document offered in evidence is or is not a valid concession, or does or does not confer a right asserted thereunder.

If the instructions of the Secretary of War to the military governor of Cuba were to be construed as a judicial determination of the rights of the concessionnaire and addressed to the judicial branch of the government of Cuba, the courts might be justified in considering the determination as binding upon them; but the instructions related exclusively to the discretion of the executive branch and expressly reserved the matter of judicial determination, and recited that "the courts of Cuba are not bound in any way by such recognition of said concession as *prima facie* lawful and existing, but shall in all cases wherein the court has jurisdiction consider questions relating to said concession without reference to said recognition."

The matter being returned to the military governor from the secre-

tary of public works, with the report that said concession was valid, the military governor on December 6, 1900, referred the case to his administrative council. On March 25, 1901, the council made a report from which is quoted the following:

First question: It refers to a problem which this council has studied and solved in an opinion which it had the honor to submit to your consideration in the matter of the concession granted to Mr. Celestino Rovira for the use of a wharf in the port of Manzanillo, and which was claimed, in the capacity of concessionary, by Mr. José Muñoz y Plá. It was then sustained, on the merits of a resolution adopted by you, that concessions granted by the Spanish Government, after the protocol of August 12, 1898, was signed between the Kingdom of Spain and the United States of America, should be declared void legally. Your resolution at the time read as follows: This claim is rejected because the concession was granted after the protocol was signed. After this date no concession could have been legally made. It would be completely useless to repeat here the arguments that were therein used in favor of the thesis sustained by the council. The concessions to Messrs. Pelaez & Gomez, as can be seen from the Gazette of Habana of the 23d of October, 1898, was granted on the 28th of September of the same year, and as the protocol was signed, as has already been stated, on the 12th of August of said year, 1898, it proves the later date at which said concession was granted.

Second question: As we have above stated, the concession granted to Messrs. Pelaez and Amigo by the general government of the island of Cuba was signed on the date we have stated, and had as an object the canalization of the river running between the bridge of "Christina" and the bay of the port toward "Atares;" in other words, the cove bearing this last name. Article 205 of the law relating to water courses reads: "The authorization given to a private company for the canalization of a river for the purpose of making same navigable, or to construct a navigable canal, will *always be granted by a law* in which it shall always be stipulated whether the work is to be aided with funds of the State; and other conditions of the concession shall be enumerated." The decrees issued by the governor-general of the island, at the suggestion of the secretary of public works, in accordance with the constitution of the government existing in this island at the time that said concession was granted, did not have the nature of a law, and therefore said concession lacks an essential requisite to constitute its validity and is affected by any irregularity which calls for its nullification, and that is: that it was granted by an administrative authority who lacked the necessary faculty to do so. In fact, should it become necessary to declare same void by the reason of the date on which it was granted, later than that on which the protocol of peace between Spain and the United States was signed, and should it be desired to naturally nullify same for the reason given in this second question, the Government would have to appeal to the tribunals of justice instituting the necessary proceedings after declaring that the resolution adopted by the governor-general of the island of Cuba on the 28th of September, 1898, is detrimental. The council has refrained from making a statement of the antecedents which it usually makes in analogous opinions, because it did not have in sight the original records of the civil government to which it has previously referred. It can, however, affirm that the project of Messrs. Pelaez and Gomez was propounded prior to the year 1897, while among the documents which have been examined there are technical reports which favor same. In view of all that has been stated the administrative council recommends that the following conclusions be adopted in the present case: *First*. That in view of the concession to Messrs. Pelaez and Gomez having been granted later than the signing of the protocol of peace between Spain and the United States, same to be declared without legal validity. *Second*. That in case that it be not thus

decided, the resolution of the General Government, of September 28, 1898, be declared detrimental, and the *fiscal* be called upon, in representation of the state, to enter an appeal in the usual way and form to obtain before the tribunals of justice the said nullification, for the motives which have been stated. You will, notwithstanding, decide what you deem best.

Upon receiving the report of the administrative council, the military governor, on March 26, 1901, forwards the papers to the Secretary of War, with the following communication:

MARCH 26. 1901.

THE ADJUTANT-GENERAL UNITED STATES ARMY,

*Washington, D. C.*

SIR: The within documents relative to the canalization of the Matadero Creek are respectfully forwarded for the consideration of the Secretary of War. Attention is invited to the report of the administrative council on the law in this case, and also to my letter of recent date on this same subject. I expressed in that letter opinion that the report of the council would be favorable as to the validity of the concession. It would seem, however, that their final conclusion is adverse. However, I am still of the same opinion as that expressed in my letter in all that pertains to the validity of the concession. I believe that inasmuch as all the principal steps in this concession were apparently taken and completed in good faith prior to the signing of the protocol, the decision of Governor-General Blanco should be confirmed by the present military governor of the island.

Inasmuch, however, as the War Department has already expressed opinion in this case, these papers are forwarded for reexamination, with request that I be informed as to whether the Department is still of the same opinion as that set forth in the original report of Judge Magoon.

Very respectfully,

LEONARD WOOD,

*Major-General, Military Governor.*

The first question reported on by the administrative council appears to the writer hereof as one of administrative policy, and one which it is eminently proper should be determined in Washington. It clearly relates to the respective and relative rights of Spain and the United States resulting from, or as affected by, a war between these nations.

The subject has been discussed hereinbefore as fully as the writer feels justified in doing under the limitations imposed on the discussion of such questions.

The second question, i. e., whether said concession could be granted lawfully except by special law of the Spanish Cortes, is a question of law, and its examination shows the necessity of referring this matter to the courts, and also the authority of the courts to pass upon it. If it were necessary to have said concession authorized by a special law of the Cortes, and no such law was enacted, then the instrument upon which the concessionnaire relies has no more legal effect than blank paper, and is binding upon no one, especially the courts, and if offered in evidence in court, in order to justify an overt act in derogation of the rights of others, the question of its competency as evidence and the legal effect of its provisions would properly come within the juris-

diction of the court, and thereupon its validity or want of validity could be judicially determined.

Whether or not it was necessary for this concession to be authorized by special law was considered at the time the Spanish officials were conducting the proceedings leading up to the grant. The controversy turned on the question as to whether or not the provisions of article 205 of the Spanish laws of waters controlled the application. Said section provides as follows:

ART. 205. The authority to an association or company to canalize a river for the purpose of making it navigable, or to establish a navigation canal, shall always be granted by means of a law in which there shall be determined whether the work is to be assisted by the funds of the State, and including the other conditions of the concession.

The board of provisional deputies held that this section applied. The board of agriculture, industry, and commerce held that said section did not apply, and the proceedings were to be had as provided for in the harbor laws, since the Matadero Creek was an arm of the sea and affected by the tides; that article 205 of the laws of waters applied only to interior streams, not affected by the tides of the sea. This contention was sustained by the Spanish chief of engineers in his report of September 16, 1897 (see Doc. 20, p. 10), wherein it is stated that the grant is to be made by the minister of colonies, under the authority conferred by article 44 of the harbor law. Said article provides as follows:

It pertains to the minister of the colonies to grant authorization \* \* \* for the construction on the sea or beaches and adjoining lands, or in the harbors, whether for private or public use, of such \* \* \* works as are complementary and auxiliary to those existing for the use or service of a port.

The superior authority of the island evidently considered that article 205 did not apply to this grant, for the concession was issued without the authority of a special law. The administrative council, as already appears, is of opinion that said article did apply, while Secretary Villalon is of opinion that the concession is valid.

It seems advisable, if not indispensable, that a legal question so difficult of solution as to give rise to such diametrically opposite conclusions should be thrashed out in the courts.

With further reference to this question, the attention of the Secretary is directed to the royal decree, dated November 25, 1897, providing for autonomous government in Cuba. The parties seeking to exercise rights under this concession insist (1) that by the provisions of article 44 of said decree the powers theretofore exercised in Cuban affairs by the Spanish minister of colonies passed to the governor-general of Cuba; (2) that the legislative authority of the Spanish Cortes over local matters and affairs in Cuba passed to a prospective insular legislature whose creation was authorized by said decree;

(3) pending the organization of said legislature the legislative authority of the island was to be exercised by the governor-general of the island and his board of secretaries; (4) that said concession having been issued while the governor-general and his secretaries lawfully exercised such power, the concession must be held to have received legislative sanction, if such sanction is required by the law.

Whether or not such is the effect of the Spanish royal decree appears to the writer to be a proper question for the courts of Cuba to consider and determine when such question is involved in an action pending in said courts between litigants asserting conflicting personal or property rights.

Respecting the situation existing herein, I continue to entertain the belief that the proper course for the military government to pursue is that recommended by the Attorney-General in the instance of the Torre Plá concession; that is—

1. To withdraw the interdict stopping said work.

2. If the Habana Canal Company attempt to exercise rights under said concession, and any party considers such exercise prejudicial to his rights and appeals to the military government for protection of said rights, that such party be referred to the courts maintained by the military government for such purposes.

3. That the administrative policy of the United States respecting the exercise of sovereign rights in Habana by Spain during the time elapsing between the signing of the protocol of August 12, 1898, and the evacuation of Habana by the Spanish forces is that exercise of sovereign rights by Spain during said period are to be considered as the acts of a *de facto* sovereign government and of such force and effect as are accorded such acts by the laws in force in that territory at the time the acts were done and performed; *provided*, such exercise of sovereign rights was in good faith and without intent to perpetrate a fraud upon the existing or prospective rights of the United States.

While this report was being written, the War Department received a copy of Order No. 95, Headquarters Department of Cuba, dated April 10, 1901, providing for a reorganization of the supreme court of Cuba. I have examined said order to ascertain if it affords a means of properly and finally disposing of the matter now under consideration, and do not think it does. Said order provides for an administrative chamber which “shall take cognizance of all matters \* \* \* which the laws at present in force assign to the chamber of the court for the administration of justice in administrative matters (contencioso-administrativos).”

If I correctly understand the proceeding known as “contencioso-administrativo,” it is in the nature of an appeal to a branch of the judiciary from a decision rendered by an official of the administrative or executive branch of the government. If so, it is necessary for the

executive branch to render a decision in order that the appeal may be taken. The questions involved which the courts of Cuba may properly consider are questions of law which the officials of the administrative branch may not properly determine, and in the absence of a decision thereon by the administrative branch the administrative chamber of the supreme court of Cuba could not acquire jurisdiction.

The question as to what extent the United States will recognize the exercise of sovereign rights in Cuba by Spain after the two nations had entered into the agreement of August 12, 1898, is a matter between those two sovereign nations. What position shall be assumed and what policy pursued by the United States in regard thereto is not to be determined by the courts of Cuba. When determined and announced by the competent authority of the United States, it is to be respected and carried out by all branches of the government of Cuba, and is not subject to review or modification by the judicial procedure known as "contencioso-administrativo."

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The Secretary of War approved the views expressed in the foregoing report, and advised the military governor of Cuba as follows:

May 29, 1901.

SIR: A report by the law officer of the Division of Insular Affairs in the matter of the concession to canalize the Matadero River is inclosed herewith, bearing my approval.

It is evident that some confusion has existed in the treatment of such subjects in Washington and Habana, arising from the widely different systems of law and judicial procedure, which form the point of departure for opinions and decisions rendered in the two places. The same terms used in the different places sometimes carry widely different meanings. The principle to which the Department has endeavored to adhere, and which was definitely determined upon at the beginning of your administration of Cuba, is that such decisions as the Department makes upon questions of this character will be limited to decisions for the purpose of guiding administrative action, and that the Department will not undertake to perform the functions of a court to determine the rights of individuals. The decision made in the Matadero Canal case on the 5th of October, 1899, was of this description. It was not designed to determine the rights of the persons claiming the concession, but to determine the duties of the military administration of Cuba in its administrative treatment of that concession, and the fourth clause of that decision was supposed to adequately express that limitation.

The secretary of public works apparently gave to the decision that the concessionnaires had a *prima facie* right a much more extended and unwarranted force when he declared that the *prima facie* right had the force of an undisputed right until declared to be *null* by the proper authority. The decision made by the War Department gave no force or effect whatever to the concession when presented to a court, relieved the concessionnaires from no burden of establishing their rights in court, and had no effect whatever except as governing the action of the administrative officers of the military government. It required that you should withdraw the prohibition which your predecessor had established by military order against the exercise of whatever rights the concessionnaires may have had, leaving the concessionnaires to prosecute



their rights precisely as if that military order had never been given. That course should be followed now. The withdrawal of that order will not, however, prevent the military government from disputing in any court of competent jurisdiction the validity of the concession, either as complainant or as defendant, just as any individual whose rights may be affected may dispute it, and in any such proceeding the claimants of rights under the concession will be bound to establish their rights precisely as if no such decision had been made; nor does this decision, or the withdrawal of the prohibitory order under it, prevent the taking of the customary proceeding, in case the concession should be held to be valid, for its annulment upon the ground that it is detrimental to the public interests.

There is one matter upon which the decision of the Department, however, is conclusive, and which is not deemed to be open for determination by any court, and that is upon the power of the Spanish Government to grant such a concession on the 28th of August, 1898. That is a political, not a judicial, question, and the view taken by the Department is that the date itself is not conclusive. Each such case must be considered by itself on its own merits. Acts of Spain in Cuba between the signing of the protocol and the evacuation, done in good faith and in the ordinary exercise of governmental powers, are to be treated as the valid acts of a government *de facto*, while acts done for the purpose of withdrawing or withholding property or valuable rights from the government about to succeed, and not done in good faith for the legitimate purposes of government, are to be treated as invalid.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

Maj. Gen. LEONARD WOOD,  
*Military Governor of Cuba, Habana, Cuba.*

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## THE GRANT OF FRANCHISES BY SPANISH OFFICIALS IN CUBA AFTER THE SIGNING OF THE PROTOCOL OF AUGUST 12, 1898.

[Submitted June 19, 1901. Case No. 771, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt by reference of a communication on the above-entitled subject, addressed to the Secretary of War by the military governor of Cuba, under date of June 5, 1901, which letter is referred to me "for remark." In response thereto I have the further honor to submit the following:

There is no doubt in my mind that the United States is justified in reviewing such exercises of sovereign authority by Spain in Cuba as took place after Congress passed the resolution of April 20, 1898, calling upon Spain to withdraw from the island. But I do not believe that in making such review the United States is at liberty to adopt the hard and fast rule that all exercises of sovereign authority by Spain in Cuba after a given date, other than the date on which the transfer of sovereignty was effected, are to be considered null and void. To adopt such a rule is to declare null and void each and every official act of all officials in all branches of the government of Cuba by Spain during the designated period, for each official of that government acted pursuant to authority derived from Spanish sovereignty and as the agent or instrument of that sovereignty.

I think it must be conceded that the ordinary exercise of governmental powers by Spain in Cuba during the interim between the protocol of August 12, 1898, and the evacuation, January 1, 1899, is to be treated as valid. Such of the acts resulting from such exercise as may be termed public or political were properly subject to modification or repeal by the United States when that Government entered into possession of the territory and assumed the exercise of sovereignty. But such of said acts as created rights of property and conveyed them to individuals or associations are not subject to such unlimited discretion. It does not follow that these grants must all be recognized without question, but I do not think they are subject to the arbitrary approval or disapproval of the military government, nor to the test of any date preceding that of the treaty of peace, whereby the rights of Spain in Cuba were "relinquished."

If the Crown of Spain possessed the proprietary title to property in Cuba, it could exercise the ordinary right of alienation and convey such of said property as remained in its possession during the progress of the war. As between belligerent nations, the test of ownership and its appurtenant privileges is *possession*; and the test of the exercise by belligerents of the privileges appurtenant to ownership and possession is *good faith* toward its adversary. This is the rule as to property actually existing prior to the grant, such as real estate or personalty.

Sovereignty may properly exercise its powers in such a way as to create property or property rights as a result of such exercise; as by the grant of patents, copyrights, franchises, and exclusive privileges. Such exercise of sovereign powers by a nation at war is to be tested in the same way as conveyances of property *in esse*. If the territorial limits of the grant are confined to territory within the possession and sovereignty of the sovereign making the grant or conferring the privilege, the exercise is thereafter to be tested by the *good faith* of the parties. It is impossible to say what evidence is sufficient to show good faith, or the want of it, in any or all cases. The question must be determined by the facts appearing in each case as it arises. Take, for instance, the grant of a patent by registration in a provincial registry of Cuba prior to December 10, 1898. Such property rights as were thereby conferred by the sovereignty of Spain would be recognized and protected by the present government of Cuba, although it would be an instance of the expelled sovereignty projecting its authority into that of the new government. But suppose that, in addition to granting the exclusive right to manufacture the patented article, the letters patent provided that for a period of fifty years the materials used in manufacturing said article should be admitted *free of duty*. Such provision might be binding upon Spain while it continued in possession of Cuba, but would not be binding upon the new government, because such attempted extension of sovereignty and con-

tinued exercise of sovereign power in that territory would be judged *mala fides* when tested by the rights of the United States. The Crown of Spain had the right to convey real estate to which it had proprietary title and of which it was in possession up to the date of the treaty of peace. But suppose it had conveyed the forts commanding Habana harbor to an individual. The United States would not be required to respect such conveyance. The Crown of Spain had the right to authorize the construction of a dam across the Matadero Creek in Habana. But suppose the purpose and effect of its construction were to cut off a portion of the city from marine commerce and to flood a large section of country. Such concession would justly be held to lack the element of good faith. On the other hand, suppose Spain, in order to secure food for the troops in Habana, had purchased in September, 1898, a quantity of flour from a merchant in Habana, and in payment conveyed to him a vacant lot or parcel of land in Habana of which the Crown of Spain had proprietary title and which was worth no more than the flour. Would the United States be at liberty to ignore the rights of the merchant because of the date of the conveyance?

The question of good faith is one which arises between the United States and Spain. It relates *exclusively* to the relative and respective rights of these two nations as they were affected by the events of the war. The United States, being the victor, is in a position to decide for itself whether or not its adversary acted in good faith. It is not a question for the courts to determine. It is *international*, and courts are without jurisdiction. It is to be resolved by the authorities charged with the maintenance of the rights of the United States in Cuba and with carrying out the purposes of the United States with regard to that island. It appears very clear to me that the powers of determination possessed by these authorities, exercised with judgment and regard for the recognized powers of national sovereignty, will afford ample protection to the interests of the United States and Cuba, and at the same time "discharge the obligations that may, under international law, result from the fact of its (Cuba's) occupation for the protection of life and property" (Art. I, treaty of peace), and likewise carry out the provision of the treaty "that the relinquishment or cession \* \* \* can not in any respect impair the property or rights which, by law, belong to the peaceful possession of property of all kinds" (Art. VIII).

I note that in the letter under consideration the military governor says:

The opinion here has been that the authority of the Spanish Government, from the signing of the protocol up to the date of completion of evacuation, did not, under the circumstances existing, authorize that Government to grant concessions conveying property or valuable rights or privileges; that it was, in fact, simply in police control of the territory pending its occupation by the victorious enemy. I believe that such is the only safe basis to proceed upon; otherwise we shall have trouble for years

over concessions granted by Spanish officials during that period. It would seem, inasmuch as all these grants involved property or valuable rights belonging to the future government of Cuba, that their transfer by the Spanish Government at that time was unauthorized.

*These remarks do not, of course, apply to any administrative measures, measures of a sanitary character, or those taken on the ground of public necessity, but only to such acts as resulted in the transfer of property of the State or concessions or privileges of value, to grant which involved the rights of sovereignty, and which were not necessary as an administrative measure.*

I italicize the concluding paragraph of the foregoing quotation in order to direct attention to the fact that the military governor recognizes the necessity of admitting that Spain properly exercised sovereign powers in Cuba, during the period under consideration, for the purposes designated in said paragraph. By reference to the protocol of August, 1898, it will be seen that said protocol made no exception and did not undertake to preserve to Spain the authority necessarily exercised in measures to which the military governor refers. If the protocol put an end to Spain's right to exercise sovereign powers in Cuba, it ended the right for all purposes.

I am of the opinion that the military government of Cuba is not at liberty to adopt the rule "that the authority of the Spanish Government, from the signing of the protocol up to the date of completion of evacuation, did not, under the circumstances existing, authorize that Government to grant concessions conveying property or valuable rights or privileges; that it was, in fact, simply in police control of the territory pending its occupation by the victorious enemy."

Such is not the rule of international law. (Halleck's Int. Law, 3 ed., vol. 2, chap. 33, secs. 23, 24, 25.)

Such is not the position taken by the United States at the peace conference in Paris.

At that time the United States dealt with Spain as being possessed of both sovereign and proprietary rights in Cuba, and required Spain to *relinquish* both.

Such is not the theory formulated in the treaty of peace.

By that instrument the United States recognized the right of Spain to convey both sovereignty and proprietary title in Cuba.

Such is not the rule adopted by the President of the United States in this matter.

It will be recalled that during the proceedings of the mixed commission to arrange the terms of the evacuation of Cuba the American commissioners learned that the Spanish officials were granting franchises and selling government property, and thereupon reported the facts to the President, who called upon the Spanish governor-general of Cuba to prevent further grants of such character. If the President had been of the opinion that the action of the Spanish authorities was null and void, because taken after the protocol was signed, he

would hardly have added to the complications then existing by presenting an unnecessary demand.

To now declare that as to Cuba after August 12, 1898, Spain was "simply in police control of the territory pending its occupation by the victorious enemy" is to take the position that at that date the United States had effected the complete conquest of Cuba and that the rights of the United States are based on that conquest. My understanding is that the position taken by the Administration is that the rights of the United States in Cuba are based upon the treaty of Paris (December 10, 1898), and not on conquest. Complete conquest, sufficient to transfer sovereign and proprietary rights, imposes obligations and liabilities which the United States avoided by the treaty of peace.

From the foregoing it follows that when a claim is made that the Spanish Government granted a franchise or conveyed property in Cuba while the condition of war existed there or after the protocol of August 12, 1898, was signed, the first question to be determined is, Was the grant by the Government of Spain in fraud upon the rights of the United States?

This question is to be determined by the authorities of the United States charged with maintaining the rights and promoting the purposes of the United States in Cuba. Each case must be adjudged on its own merits and the question resolved by consideration of the facts, circumstances, and conditions involved in the transaction. Each case is a bridge which can not be crossed until reached.

If it should be determined that the grant is void for want of *bona fides* or because it violates the rights of the United States, such determination should be declared and an order issued prohibiting the exercise of rights under said grant. This would end that particular case.

If it should be determined that the grant was not void as against the rights of the United States, it is not necessary for the United States authorities to declare such determination, and they should not do so. By refraining from making such declaration the executive department enables the courts of Cuba to determine the questions of procedure and authority of the officials under Spanish law. It does not follow that because Spain *could* have granted the concession that therefore Spain *did* grant it.

The Government of Spain is a constitutional monarchy, and the validity of a concession may involve a constitutional question. The grant of franchises or concessions which the Government was authorized to make was regulated by law and required to be accomplished by following a procedure established by law. In every case the validity of a concession would involve the question of whether or not the grant had been made pursuant to these Spanish laws.

I doubt not that this question may be judicially determined by the

executive branch of the military government of Cuba if it sees fit to exercise the power, and that such determination of the question by the executive branch would be binding upon the courts of Cuba; but I understand the administrative policy adopted by the War Department for the military government of Cuba to be, that the executive branch of the military government of Cuba is to refrain, whenever possible, from judicially determining such questions and relegate them to the courts. Therefore the officials of the executive branch of the military government of Cuba ought not to ratify or approve any of the grants or concessions heretofore issued by Spanish authority in the island, for to do so is to bind the courts to sustain the ratification.

The executive branch of the military government will continue, of course, to exercise the *police power* and prevent the violation of the rights of others by those whose claims of authority are not supported by sufficient showing to make out a *prima facie* case, and will take such steps as are necessary to protect the public welfare in all matters subject to the control of the police power of the government.

In short, when the military government of Cuba is of opinion that a particular grant, if otherwise valid, is not in violation of the rights of the United States as existing at the time the grant was made by the Spanish authorities, the executive branch of the military government will take no action in regard thereto, except to regulate the manner of exercising the rights asserted under the concession, by the ordinary exercise of the police power, and thereby leave open the questions of law involved for the determination of the courts. When the military government of Cuba is of opinion that an alleged grant purporting to have been made by the authority of Spanish sovereignty is in fraud of the rights of the United States as they existed at the time the grant was attempted, the military government will prohibit the exercise of rights under said alleged grant.

In his letter of June 5, 1901, the military governor of Cuba, having reference to the Spanish concession for the canalization of Matadero Creek and in response to the letter of instruction from the Secretary of War, dated May 29, 1901, says:

The point at issue was whether or not the War Department was willing that I should *confirm the approval of the former governor-general*. \* \* \* I understand from the general tenor of your letter that such approval is agreeable to the War Department. \* \* \* In accordance with your general instructions, and having considered the case upon its own merits, I will indorse upon it my acceptance of it as a valid concession.

The letter of the Secretary of War to which the military governor refers is as follows:

MAY 29, 1901.

SIR: A report by the law officer of the division of insular affairs, in the matter of the concession to canalize the Matadero River, is inclosed herewith, bearing my approval.

It is evident that some confusion has existed in the treatment of such subjects in Washington and Habana, arising from the widely different systems of law and judicial procedure which form the point of departure for opinions and decisions rendered in the two places. The same terms used in the different places sometimes carry widely different meanings. The principle to which the Department has endeavored to adhere, and which was definitely determined upon at the beginning of your administration of Cuba, is that such decisions as the Department makes upon questions of this character will be limited to decisions for the purpose of guiding administrative action, and that the Department will not undertake to perform the functions of a court to determine the rights of individuals. The decision made in the Matadero Canal case on the 5th of October, 1899, was of this description. It was not designed to determine the rights of the persons claiming the concession, but to determine the duties of the military administration of Cuba in its administrative treatment of that concession; and the fourth clause of that decision was supposed to adequately express that limitation. The secretary of public works apparently gave to the decision that the concessionnaires had a *prima facie* right a much more extended and unwarranted force when he declared that the *prima facie* right had the force of an undisputed right until declared to be *null* by the proper authority. The decision made by the War Department gave no force or effect whatever to the concession when presented to a court, relieved the concessionnaires from no burden of establishing their rights in court, and had no effect whatever except as governing the action of the administrative officers of the military government. It required that you should withdraw the prohibition which your predecessor had established by military order against the exercise of whatever rights the concessionnaires may have had, leaving the concessionnaires to prosecute their rights precisely as if that military order had never been given. That course should be followed now. The withdrawal of that order will not, however, prevent the military government from disputing in any court of competent jurisdiction the validity of the concession, either as complainant or as defendant, just as any individual whose rights may be affected may dispute it, and in any such proceeding the claimants of rights under the concession will be bound to establish their rights precisely as if no such decision had been made; nor does this decision, or the withdrawal of the prohibitory order under it, prevent the taking of the customary proceeding, in case the concession should be held to be valid, for its annulment upon the group that it is detrimental to the public interests.

There is one matter upon which the decision of the Department, however, is conclusive, and which is not deemed to be open for determination by any court, and that is upon the power of the Spanish Government to grant such a concession on the 28th of August, 1898. That is a political, not a judicial question, and the view taken by the Department is that the date itself is not conclusive. Each such case must be considered by itself on its own merits. Acts of Spain in Cuba between the signing of the protocol and the evacuation, done in good faith and in the ordinary exercise of governmental powers, are to be treated as the valid acts of a government *de facto*, while acts done for the purpose of withdrawing or withholding property or valuable rights from the Government about to succeed, and not done in good faith for the legitimate purposes of government, are to be treated as invalid.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

Maj. Gen. LEONARD WOOD,  
*Military Governor of Cuba, Habana, Cuba.*

It appears to the writer that the military governor has misinterpreted the instructions set forth in the foregoing letter. He was instructed to withdraw the military order of the military officer preceding him in command of the division of Cuba; further affirmative

action by him does not seem to have been contemplated. If he shall now "confirm the approval of the former governor-general" and "indorse upon it my acceptance of it as a valid concession" such action will preclude the courts of Cuba from determining whether the Spanish official who issued the concession was authorized to make the grant by *Spanish law*, or, if so authorized, whether or not the proceedings taken fulfilled the requirements of the Spanish law. I think the proper indorsement for the military governor of Cuba to make on the concession to canalize Matadero Creek, and on other concessions which the United States considers as not invalidated by want of good faith on the part of Spain, would be as follows:

The United States makes no objection to this alleged grant by Spain nor to the terms and conditions thereof (insert description), *provided* said alleged grant was made pursuant to lawful authority and procedure under the laws of Spain in force in the territory to which the concession appertains at the time the grant was made. The questions of authority and procedure under Spanish law are to be determined by the courts of Cuba when involved in cases properly pending therein.

When the United States does object to a concession as invalid for want of good faith, a proper indorsement would be as follows:

The United States objects to this alleged grant by Spain (insert description) and refuses to recognize the same as valid. Therefore the military government of Cuba prohibits the assertion or exercise of any rights or privileges thereunder.

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The Secretary of War approved the views expressed in the foregoing report and instructed the military governor of Cuba as follows:

WAR DEPARTMENT, OFFICE OF THE SECRETARY,

DIVISION OF INSULAR AFFAIRS,

*Washington, D. C., June 21, 1901.*

SIR: I have the honor to acknowledge receipt of your communication of June 5, 1901, respecting the concession for canalization of Matadero Creek, Habana, and requesting further explanation of the administrative policy adopted by the War Department with reference to alleged concessions granted by the Spanish government of Cuba, after the protocol of August 12, 1898, was signed. In answer thereto allow me to say:

The United States, on August 12, 1898, by reason of successful military operations, had induced Spain to sue for peace and was in a position to require Spain to comply with its demands. But the United States had not effected a complete conquest of all Cuba, because all parts of the island were not in the possession of our military forces. Under the laws of war, as long as Spain continued in possession of territory in Cuba, so long Spanish sovereignty continued over that particular territory, and the proprietary title in and to public property therein situate belonging to the Crown under Spanish law would remain with the Crown of Spain. While this condition continued, the Government of Spain would be justified in exercising sovereign powers in said territory, and the Crown of Spain would be justified in exercising the ordinary privileges appurtenant to the proprietary title of public property under the laws of Spain, provided such action as was taken was in good faith, i. e., with due regard to the rights of its adversary.



This condition was terminated by the treaty of Paris. By that instrument sovereignty and title in Cuba (art. 1) and proprietary title to the public property in the island (art. 8) were relinquished by Spain, and provision made that "upon its evacuation by Spain" the island was to be "occupied by the United States," and that the United States should "so long as such occupation shall last assume and discharge the obligations that may under international law result from the fact of its occupation." \* \* \* (Art. 1.)

The right of the United States to administer sovereign powers in Cuba, and its right to the proprietary title of public property theretofore possessed by the Crown of Spain, were completed by and date from the treaty of Paris, December 10, 1898. It is therefore inaccurate to say "all these grants involved property or valuable rights *belonging to the future government of Cuba.*"

When attempt is made to exercise rights under an alleged concession purporting to have been granted by officials of the Spanish government of Cuba, after the signing of the protocol of August 12, 1898, the military government of Cuba is required to consider the matter in two phases, the first being—

Was said grant justified by the laws of war? That is to say: (a) Was Spain in possession of the territory affected? (b) Was the sovereignty of Spain attached thereto? (c) Did Spain act in good faith toward its adversary?

The second phase is—

Was said grant justified by the laws of Spain? That is to say: (a) Was the grant authorized by the laws of Spain? (b) Were the requirements of the Spanish law fulfilled in making said grant?

The first phase is to be passed upon and the questions involved determined by the authorities charged with maintaining the rights and promoting the purposes of the United States in Cuba, for the reason that said questions involve the relative and respective rights of the United States and Spain as affected by a war in which the United States was the victor. In matters of this character the official so charged is the military governor.

The second phase is to be passed upon and the questions involved determined by the judicial branch of the military government of Cuba, for the reason that the determination of said questions requires the exercise of judicial functions ordinarily performed by courts, and the administrative policy in Cuba is to permit the courts to perform those functions of government termed judicial. In determining the questions properly to be considered by him, the military governor should exercise care not to preclude the possibility of the courts examining and determining the questions involved in the second phase.

Where the military governor determines in favor of a concession the determination should be declared as follows:

"The United States makes no objection to this alleged grant by Spain, nor to the terms and conditions thereof (insert description); provided said alleged grant was made pursuant to lawful authority and procedure under the laws of Spain in force in the territory to which the concession appertains at the time the grant was made. The questions of authority and procedure under Spanish law are to be determined by the courts of Cuba when involved in cases properly pending therein."

When the determination is against a concession it should be declared as follows:

"The United States objects to this alleged grant by Spain (insert description), and refuses to recognize the same as valid. Therefore the military government of Cuba prohibits the assertion or exercise of any rights or privileges thereunder."

Yours, respectfully,

ELIHU ROOT, *Secretary of War.*

Maj. Gen. LEONARD WOOD,  
*Military Governor.*

**CONSTRUCTION TO BE GIVEN THE CONGRESSIONAL ENACTMENT  
APPROVED MARCH 2, 1901, RELATING TO THE PUBLIC LANDS  
AND TIMBER IN THE PHILIPPINES.**

[Submitted March 15, 1901. Printed as War Department publication by order of the Secretary of War. Inserted in Annual Report of Secretary of War, 1901, as Appendix F. See also pp. 70-71 of said report.]

[Case No. 1991, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the receipt of your request for a report on the proper construction of the provision in the Army appropriation bill, approved March 2, 1901 (Public No. 118)—

That no sale or lease or other disposition of the public lands or the timber thereon or the mining rights therein shall be made.

The particular subject calling for consideration is the effect of this Congressional enactment upon the right of the United States governmental authorities in the Philippines to provide for the use of forest products in the public forests of the Philippine Islands by the residents of the archipelago and by the Government.

The question is presented to the War Department by the following cablegram from the Philippine Commission:

MANILA, March 7, 1901—6.55 a. m.

Root,

*Secretary of War, Washington:*

High price lumber one of people's greatest burdens; present situation very little timber on private land; people almost entirely are obliged to depend upon purchase timber from Government land to repair damage owing to the war. If recent legislation abrogates General Orders, Headquarters Department of Military Governor, series of last year, No. 92, fixing reasonable rates and proper limitations under which any resident may cut public timber, it will produce greatest hardship. If so, ask authority to put imported timber on free list. Is cutting public timber for public works forbidden? Request opinion.

Taft.

To properly understand said provision it is necessary to consider the entire paragraph of which it is a portion and the general purpose of the legislation. Said paragraph is as follows:

All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion: *Provided*, That all franchises granted under the authority hereof shall contain a reservation of the right to alter, amend, or repeal the same.

Until a permanent government shall have been established in said archipelago full reports shall be made to Congress on or before the first day of each regular session of all legislative acts and proceedings of the temporary government insti-

tuted under the provisions hereof; and full reports of the acts and doings of said government, and as to the condition of the archipelago and of its people, shall be made to the President, including all information which may be useful to the Congress in providing for a more permanent government: *Provided*, That no sale or lease or other disposition of the public lands or the timber thereon or the mining rights therein shall be made: *And provided further*, That no franchise shall be granted which is not approved by the President of the United States, and is not in his judgment clearly necessary for the immediate government of the islands and indispensable for the interest of the people thereof, and which can not without great public mischief, be postponed until the establishment of permanent civil government; and all such franchises shall terminate one year after the establishment of such permanent civil government.

To understand the purpose and extent of this legislation it is necessary to consider the conditions with which Congress was called upon to deal. The Taft Philippine Commission, in its report to the Secretary of War dated November 30, 1900, says (pp. 54-57):

The timber of the Philippine Archipelago forms one of its most important natural sources of wealth. The timber-producing trees have been classified in order of their commercial value as follows: Superior group, 12 species; first group, 17 species; second group, 49 species; third group, 74 species; fourth group, 200 species; fifth group, 33 species; total species, 385. It is certain that there still remain more than fifty species not yet classified. Included in this list are very hard woods capable of taking a beautiful polish; woods that resist climatic influences and are proof against the attacks of white ants; woods especially suited to use for sea piling on account of their imperviousness to the attacks of *Teredo navalis*, or for railroad ties, because they last extremely well when placed in the ground; in short, there are woods for every imaginable use.

There is a great variety of trees yielding valuable gums, and rubber and gutta-percha are abundant in Mindanao and Tawi-Tawi. At least 17 dyewoods are produced within the limits of the archipelago, while other trees yield valuable essential oils or drugs. It has been estimated by the present head of the forestry bureau from such data as he has been able to secure that there are not less than 40,000,000 acres of forest lands in the archipelago.

Under the Spanish administration a force of 66 expert foresters and 64 rangers, with 40 other subordinates, such as clerks, draftsmen, etc., formed the personnel of the forestry department. The service was organized in 1863, and throughout its history the higher officials were selected from the Spanish corps of engineers. No Filipino was permitted to hold any of the more important positions. In addition to the care of the forests, the department had in charge the survey of all public lands. The annual income during the last years of the Spanish régime was approximately \$150,000 (Mexican).

The present forestry bureau was organized on the 14th of April, 1900, under General Orders, No. 50, which placed Capt. Geo. P. Ahern, Ninth United States Infantry, in charge, making no specifications whatever as to his duties. He received authority to employ 4 foresters, 2 rangers, a stenographer, and a translator. This force was gradually increased until on the 18th of September it consisted of a translator, a stenographer, a chief assistant, 7 assistant foresters, 1 head ranger, and 13 rangers.

On July 1 regulations prepared by the forestry bureau and governing the utilization of the forest products of state lands were published as General Orders, No. 92. These regulations were based on those in force under Spanish sovereignty, but the latter were somewhat condensed and a few changes were introduced. The old blank

forms were kept and additional ones provided for. Under the new rules the prices per cubic foot charged by the Government for timber cut on public lands are as follows: Superior group, 7 cents; first group, 5 cents; second group, 4 cents; third group,  $1\frac{1}{2}$  cents; fourth group, 1 cent; fifth group,  $\frac{1}{2}$  cent (United States currency). There are given lists of the trees of the several groups, with their common names and their scientific names, so far as the latter have been ascertained, together with rules governing the cutting and measuring of timber and the payment of the charges thereon, as well as provisions as to how the various gums shall be gathered.

It seemed extremely important that an order allowing the cutting of timber should be put into force at the earliest possible time, as there was practically a lumber famine at Manila and other important points in the archipelago, while the destruction of buildings incident to the war and the increased demand for good dwelling houses, resulting from the large influx of Americans, made it imperative that provisions should be made so that felling of trees and marketing of lumber might lawfully begin. The regulations were therefore necessarily somewhat hastily compiled by those having the work in charge.

The Commission is now able to profit by the practical results obtained through putting them into force, and is of the opinion that the clerical work connected with the cutting and marketing of timber can be simplified considerably with profit to all concerned. It seems probable that the rates charged, which are greatly in excess of those charged under the Spanish tariff, should be somewhat reduced. The whole matter will be made the subject of careful investigation and legislative action in the near future.

Early in September the Commission investigated the affairs of the forestry bureau and learned that no attempt had been made to enforce the forestry regulations outside the island of Luzon, even in such great commercial centers as Iloilo and Cebu. With a view to the immediate increase of its efficiency the forestry bureau was reorganized so as to consist of an officer in charge, an inspector, a botanist, a chief clerk and stenographer, a translator, a law clerk, a record clerk, ten assistant foresters, and thirty rangers, the existing force of foresters and rangers to be augmented gradually, as occasion might require, until the number above indicated was reached.

Active steps are now being taken toward the location of foresters and rangers at important points throughout the archipelago as fast as circumstances will permit.

The present monthly collections of revenue from forest products are about \$8,000 (Mexican). This sum should be largely increased in the near future. If the statements of the chief of the forestry bureau are correct the forests of the Philippine Islands are more extensive and more valuable than those of India. It is of the utmost importance that the wanton destruction of valuable timber which has been allowed to go on here in the past should be checked at the earliest practicable time, while with the exercise of proper supervision over the cutting of timber and the construction of better roads the annual revenue from the sale of forest products should soon become a very important source of income. The chief difficulty which confronts us at present is the lack of honest and active subordinate officials.

It is absolutely necessary that the men who occupy these posts should be familiar with the more important of the different kinds of woods, so that they may be able to survey consignments of timber and make proper collections thereon. The men at present used for this work were almost without exception formerly employed for it under the Spanish régime, and in the view of the chief of the bureau many of them are corrupt. They are exposed to severe temptation, for it is a simple matter to transfer a wood from the class in which it belongs to a lower class, thereby saving a considerable sum to the owner, who is often only too willing to give a part of what he can make in this way to the forester or ranger with whom he is dealing in order to escape the payment of the full amount due.

It is believed that competent men should be trained on the ground for these posi-

tions as speedily as possible, and that meanwhile a close inspection should be maintained over the work of the present incumbents in office, who have been informed that if they are detected in dishonesty they will not only be dropped from the service of the forestry bureau, but will be ineligible for appointment to any office which falls under the civil-service law.

Great difficulty has been experienced in securing the services of a competent man for inspector, but it is hoped that such a man may soon be found.

The Commission has cabled to Washington for four experienced foresters with a knowledge of Spanish and of tropical botany. These men upon their arrival will enable us to put the service in a much more satisfactory condition. It is very important that responsible and fully qualified white men should be stationed at the more important centers of the lumbering industry in these islands if the forests are to be exploited intelligently and the Government is to receive proper compensation for the timber cut on public lands.

It is believed that nine-tenths of the timber standing in many of the forests of these islands might be removed with great profit to the Government and actual improvement to the forests, inasmuch as this would give opportunity for rapid growth to the trees left standing.

Capt. George P. Ahern, Ninth United States Infantry, in charge of the forestry bureau of the military government of civil affairs in the Philippines, in his annual report dated August 15, 1900, says:

From various sources of information I am led to believe that the public forest lands comprise from one-fourth to possibly one-half of the area of the Philippine Islands, viz, from 20,000,000 to 40,000,000 acres. There are fully 5,000,000 acres of virgin forest owned by the state in the islands of Mindora and Paragua. The island of Mindanao, with an area of more than 2,000,000 acres, is almost entirely covered with timber and but a small percentage of cultivated land. In the province of Cagayan, on the island of Luzon, there are more than 20,000,000 acres of forest. In the places just mentioned the cuttings up to the present date have been very small. In many other provinces in the island of Luzon, especially in the country close to Manila, much timber has been cut, and to fill large contracts the lumbermen are obliged to go quite a distance from this city in order to find a suitable tract. In a recent visit to the southern islands of this group I was impressed with the amount of timber standing on the smaller islands. Frequently the topography was such that it could be exploited with facility. I saw tracts of virgin forest where from 10,000 to 20,000 cubic feet of magnificent timber per acre was standing, trees more than 150 feet in height and with trunks clear of branches for 80 feet and more than 4 feet in diameter. There are many millions of cubic feet of timber in these forests that should be cut in order to properly thin out the dense growth. For instance, where there are three or four trees growing on a space required by one, that one so freed would put on more good wood each year than the four together. Forestry is largely a question of light and shade; it is comparatively easy to learn the most desirable tree species for a certain locality, but the question of whether 300 or 3,000 trees should remain on 1 acre is where the real value of the scientific forester is shown.

There are 396 tree species mentioned in the present forestry regulations, and we know of 50 more growing in these islands, and each week we learn of still other species. It is safe to state that the number of tree species found in these islands will be nearer 500 than 450, a great majority of these undoubtedly being hard woods. The edges of the great forests have been scarcely cut away, and 50 valuable hard woods are given to the world, the full value of which species have not been demonstrated as yet.

There is a great variety of valuable gum, rubber, and gutta-percha trees, but the trade has been ruined by the Chinese in their efforts at adulteration and other fraudulent practices.

We have a list of 17 dyewoods, the revenue from which, if properly exploited, should pay the cost of the forestry service.

A book has been written by Tavera on the medicinal qualities of the native plants, many trees being mentioned as possessing valuable medicinal qualities.

The ylang ylang tree abounds here, its blossoms producing an oil which is the base of many renowned perfumes. Quite a revenue is gained by those owning these trees.

The west slope of the island of Romblon is a mass of cocoanut palms from the water's edge to the mountain top, every tree bringing in a yearly revenue of from \$1 to \$2, and when it is realized that 400 or 500 such trees may be grown on an acre, one is struck with the wisdom of that former commander of Romblon who insisted upon such extensive planting of these trees. In all parts of the southern islands these trees seem to grow without any effort or care.

Southern Paragua and Mindanao are celebrated for the great variety of gum, rubber, and gutta-percha trees grown there, but these forests have never been properly exploited, and afford a very attractive field for the investigator.

This office is at work compiling notes on about 50 of the most important tree species, giving popular and scientific descriptions of same, with colored illustrations of the fruit, flowers, and leaf of each species. This, if arranged in book form, would be of service to all interested in our forests, and will be of great value to the American and other lumbermen who are not familiar with the tropical tree species and who wish to operate in these islands. It will be the aim of this bureau to collect all data of interest connected with our forests. Specimens of woods will be added to those now on hand and their uses and beauty shown as far as practicable.

#### MEANS OF COMMUNICATION.

There are no forest roads or river driveways in these islands that are worth mentioning. It will be impossible to exploit these forests until roads are constructed, rivers improved, and harbors provided. The methods at present are exceedingly slow and expensive. The tree is felled far from any road, is hauled out very slowly by one or more carabaos, many tracts being left untouched, due to the difficulty of the haul and the lack of roads. The natives are not skilled lumbermen, and while paid but a small wage are by no means cheap labor when we consider the cost of felling and hauling a cubic foot of timber to the shipping point.

The most interesting statistics from foreign forestry reports are those published by Germany, showing the increase in the value of forest lands as the character of the roads improve. Good stone roads have made the German forest lands worth to-day on an average of \$181 (gold) per acre, and these same lands with standing timber less in quantity and quality than we find at present on many large areas in these islands. There will be some difficulty in the construction of roads in such places as Cagayan, Mindoro, and Paragua, but these difficulties can be overcome. The money for this construction should be appropriated from the forest revenues. Competent engineers should supervise the work. Stone is plentiful and available, but labor is scarce, and such as we have is poor and uncertain. This latter will be the one great difficulty; when that is solved, engineers and money will build roads that will make the Philippine forests yield a revenue that is undreamed of to-day by the residents of these islands.

Lumbermen contemplating extensive operations, after solving the labor problem, must next consider the roads and driveways. The main roads should be built by the State with a view to the gradual betterment of the tributary forests. For several years the efforts of the forestry service should be directed to a judicious thinning of the dense jungles where an ax has never been heard; many varieties of undesirable tree species should be cut away and the dense growth thinned out. The State and

lumbermen should work together; after the first roads are started the lumbermen can figure on the possibilities of the first forest so tapped. There are no pure forests of any one-tree species; dozens of varieties grow in each forest, but rarely more than three or four trees of one variety found grouped together, so that any lumberman looking for a shipload of any one species would find it impossible to cut that and no other, but would be obliged to procure the same by purchase from men operating the different sections. Lumbermen must be willing to take dozens of varieties of tree species; these species may not be desired by the lumberman, but the forester must get rid of them. A plan of exploitation should be provided in advance by the forestry bureau and then submitted to the lumbermen interested, and have the forests cut as per said plans, either by contract or by the payment of the State price per cubic foot.

#### SURVEYS.

Before such can be done, however, it will be necessary to make a survey of the public lands.

Triangulation surveys can be made at the present time, and as conditions permit the detailed work can follow.

Then the forest surveys may be made, and the amount and kinds of standing timber reported thereon. Plans of exploitation would then be possible, and the lumbermen would know where to go to cut the timber desired and the amount available.

#### CONCLUSIONS.

From the above it is evident that there is a very large area of very valuable public forest land in these islands; that these forests are as a rule not at present available, due to the lack of roads and skilled lumbermen. The present personnel have not been well trained, and have never practiced scientific forestry. The public forest lands are unsurveyed and the amount of standing timber unknown.

We must begin at once with the personnel. The students about to graduate in the colleges here should be shown the advantages of a career in the forestry service and a forestry class started, so that when scientific forestry is begun we will have properly trained men to assist in the work.

Large lumber companies will not be ready to do much work here for at least one year. By that time we will be ready with an administrative force.

The aim of the forester is to improve the forest until a given area produces each year a maximum of wood of the most desirable species. A careful study of the desirable species is of first importance. The undesirable species must be cleared away, and by thoroughly and scientifically exploiting any one good forest tract the great increase in value of the same will be apparent and a policy of rational forestry encouraged in these islands, which policy in time will make these forests a source of great wealth, will afford employment for many thousand men, will make such islands as Mindoro habitable, will regulate the water flow, and will afford ready communication through what is at present impassable and deadly jungle. (See Appendix KK, Report of the Military Governor of the Philippine Islands on Civil Affairs, year ending June 30, 1900, pp. 188-190.)

The foregoing reports were communicated to Congress and presumably considered by that body. It is well known that by reason of military operations and the ravages of the insurgents very many dwellings and other buildings, in many instances entire towns, have been destroyed and the inhabitants made homeless refugees. The Government is now seeking to induce the inhabitants to return to their homes, rebuild the houses and towns, and engage in the pursuits of peace.

The existing and improving conditions create a desire among these people to return home; but it is necessary to rebuild these homes, and to do that, timber must be secured. The enormous forests in the Philippines formerly belonged to the Spanish Crown. Spain permitted the free cutting of timber to be used exclusively in the construction of homes for the parties making application and for bridges and other public structures and improvements in the islands.

Several of the more important industries of the islands by which the inhabitants secure the means of existence consist of collecting the products of these forests, such as sap, from which a great variety of valuable gums, rubber, and gutta-percha is made; the perfume-producing blossoms of trees, cocoanuts, and other valuable nuts, tropical fruits, dyewoods, and medicinal plants, etc.

Cooking in the Philippines as in other tropical countries is done with charcoal, great quantities of which are consumed in the islands. To produce the necessary supply, the "down timber" and surplus growth of the forests has been utilized for centuries.

The surplus growth and "down timber" of every great forest works positive injury to the forests, and every nation which has forestry laws intended to promote the welfare of its forests provides for the disposition and removal of such timber in order to enable the remaining trees to acquire a better growth and symmetry, and to prevent the destruction of the forests by fire.

It can not be presumed that Congress intended to render it impossible for the great majority of the inhabitants of the islands whose homes have been destroyed to rebuild their houses; nor to destroy the several industries by which so many people of the industrial classes earn a living; nor to increase the difficulties of reestablishing the conditions of peace and stopping the war in said islands; nor to prevent the authorities of the local government from preserving the valuable forests which are now the property of the United States. On the contrary, the presumption is that Congress intended to promote such matters and objects, and if said act can be interpreted in harmony with such purpose, that interpretation must be given it.

Only a small quantity of growing timber in the Philippines is the subject of private ownership. In the cabled inquiry of the Commission hereinbefore set out appears the following:

Very little timber on private land; people almost entirely are obliged to depend upon purchase of timber from Government land to repair damages owing to the war.

Mr. Thomas Collins, testifying before the Philippine Commission at Manila, in May, 1899, says:

I have been in this country thirty years last February, and have been engaged in the timber business some twenty-five years. \* \* \* You could get concessions from the Government to cut timber on the land anywhere, but you could not cut on private property without making an arrangement with the man who owned the land;



but there were very few people who owned timber lands. \* \* \* The land owned by private individuals was mostly under cultivation, or without being under cultivation the good timber has been cut off. (Report of Philippine Commission, 1899, vol. 2, pp. 79-85.)

If a construction is given this Congressional enactment which cuts off the inhabitants of the islands in their hour of need from the natural supply of timber to which they have had recourse for centuries, they will be at the mercy of the owners of the small amount of timber land subject to private ownership, who will possess a monopoly capable of being more oppressive than any one of the exclusive concessions granted by the Crown of Spain. Nothing short of malevolence would attribute such intention to the American Congress.

The enactment under consideration was undoubtedly intended by Congress to accomplish some important and well-defined purpose. Continuing the investigation of the facts and conditions with which Congress felt called upon to deal, it will not escape observation that during the last session of the late Congress it was stated in the newspapers and in Congress that companies were being organized for the purpose of acquiring title to large bodies of timber lands in the Philippines belonging to the Government of the United States and to the timber on said lands, with intent to cut down and destroy said forests. It is impossible at this time to determine the present or prospective value of these vast tropical forests, and it would be manifestly injudicious for the United States to dispose of them or to permit the enactment of a general law, the operation of which would enable anyone to secure permanent rights in regard thereto, either of title to the land, the timber, or the products thereof.

The enactment under consideration was engrafted upon the Army appropriation bill by what is known as the "Spooner amendment." As originally offered this amendment did not contain the proviso "That no sale or lease or other disposition of the public lands or the timber thereon or the mining rights therein shall be made." The amendment originally provided that—

All military, civil, and judicial powers necessary to govern the Philippine Islands \* \* \* shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct. \* \* \*

Congress might reasonably anticipate that the persons designated by the President to exercise legislative powers under this enactment would provide a general law governing forestry and forests in the islands, which by virtue of general provisions and operation would enable persons and companies to secure large tracts of land and valuable rights which would eventually prove embarrassing to the United States, and possibly be secured without adequate compensation. The probability of forestry legislation was made greater by the fact that the

report of the Philippine Commission, dated January 24, 1901, stated that—

The whole matter will be made the subject of careful investigation and *legislative action* in the near future.

The forests in the Philippines belonging to the United States are part of the property of the United States. The right to dispose of such property is vested in Congress by the Constitution. (Art. IV, sec. 3.) This right Congress has sedulously guarded during our entire history. It seems clear that by this proviso Congress manifested its unwillingness to authorize the authorities of the local government of the Philippines to alienate or permanently dispose of the property of the United States consisting of the forests on public lands in the islands.

That Congress intended said proviso as a restriction upon the authority to grant permanent rights by general legislation, and not a restriction on temporary privileges of limited extent, such as may be secured by a franchise, permit, or license, is shown by the additional proviso connected with and relating to the proviso under consideration, as follows:

*And provided further*, That no franchise shall be granted which is not approved by the President of the United States, and is not in his judgment clearly necessary for the immediate government of the islands and indispensable for the interests of the people thereof, and which can not, without great public mischief, be postponed until the establishment of permanent civil government; and all such franchises shall terminate one year after the establishment of such permanent civil government.

“Franchise” is defined as follows:

A liberty, a right, a privilege. (English's Law Dic.)

A special privilege conferred by government on individuals, and which does not belong to the citizens generally by common right. \* \* \* In a popular sense, the word seems to be synonymous with right or privilege. (Bouvier's Dic.)

A particular privilege conferred by grant from a sovereign or a government and vested in individuals; an *immunity* or *exemption* from ordinary jurisdiction. (Webster.)

Apparently Congress recognized the rights and necessities of the inhabitants of the islands, and attempted to provide therefor and at the same time to protect the interests of the United States. To accomplish this double purpose Congress protected the United States from improvident disposal of its property under the provisions of a general law, and provided for the necessities of the inhabitants by permitting the grant of such temporary privileges as were “indispensable for the interests of the people,” placing upon the President of the United States the responsibility for each of such grants.

An administrative officer charged with the duty of executing a law is without authority to pass upon the wisdom or unwisdom of the enactment; but it is his duty to ascertain the meaning, purpose, and extent of the law in order that he may not fail by omission nor offend

by commission in executing it. To assist such officer in such endeavor there are certain established canons of statutory construction which require that in attempting to construe a statute consideration be given to (1) the surrounding facts and circumstances, (2) the history of the enactment, (3) the elementary rule that construction is to be made of all the parts together, and (4) that force and effect is to be given to each and every part and provision. (See Endlich on Interpretation of Statutes, par. 28 et seq.)

The rule adopted by Lord Coke is: That it is necessary to consider (1) what was the law before the act was passed, (2) what was the mischief or defect for which the law had not provided, (3) what remedy the legislature has appointed, and (4) the reason of the remedy. (See *Heydon's case*, 3 Rep., 76; 10 Rep., 73, note *a*.) Also, the equally well-known rule adopted by Turner, L. J., that the true meaning of a statute is to be found not merely from the words of the act, but from the cause and necessity of its being made, a comparison of its several parts and extraneous circumstances, the context of the law, its reason and spirit, and the inducing cause of its enactment. (*Hawkins v. Gathercole*, 6 De G. M. and G., 1, 24 L. J., 338; *McIntyre v. Ingraham*, 35 Miss., 25; *State v. Judge*, 12 La. Ann., 777.)

In preparing this report the writer has endeavored to adhere strictly to these rules.

The communication from the commission, as understood by the writer, presents the following inquiries:

1. Does the Congressional enactment hereinbefore set forth prohibit granting to the residents of the Philippines the privilege of cutting timber on Government land, to be used in building houses, securing fuel, and similar domestic purposes?

If the construction of said enactment hereinbefore attempted is correct, said inquiry is to be answered in the negative, and attention called to the fact that the privilege described may be granted by the President of the United States, when clearly necessary for the immediate government of the islands and indispensable for the interests of the people thereof, upon such terms and conditions as his discretion may determine, provided the license contains a reservation of the right to alter, amend, or repeal the same; and the privilege so granted shall not continue longer than one year after the establishment of permanent civil government in the islands.

2. Does said enactment prohibit cutting timber belonging to the public for use in the construction of bridges and other public works in the islands?

The importance of this inquiry is increased by the fact that the commission recently appropriated \$1,000,000 in gold for the repair of roads and bridges, the timber used to be taken from the public forests, as was the usage under Spanish dominion. The Government is also

engaged in constructing a mammoth building to be used in the manufacture of ice, and contemplates building an extension of the custom-house at Manila. In addition there exists a necessity for the erection of many schoolhouses, court-houses, barracks for soldiers, and other public structures throughout the islands.

If the proprietary title to the public work is in the United States, there is no diminution of the title of the United States to other property when it is used in constructing said works. The question resolves itself into a question as to the power of the United States authorities in the Philippines to designate the location or place of deposit for property belonging to the United States. It would be a captious and unwarranted construction of said enactment which would deny this authority to said officials.

Where the proprietary title to a public work was in a municipality or other political subdivision, a strict construction of said enactment may require that said municipality should secure a permit from the President before cutting timber belonging to the public for use in constructing said public work, for technically the title to the timber should pass to the municipality, and would therefore be governed by the same rules as apply to individual residents.

3. Does said enactment abrogate General Orders, military governor of the Philippines, No. 92, Series 1900?

A copy of General Orders, No. 92, is submitted herewith. They constitute a substantial adoption of the forestry laws of Spain in force in the Philippines prior to the American occupation. The general purpose of said laws and of said general orders is to protect and promote the public forests, and the provisions thereof, when properly administered, appear to be well calculated to produce the desired result. (*See Rep. of Com. and Capt. Ahern, ante.*)

The purpose of the Congressional enactment is to protect the proprietary title of the United States to the forests. There is therefore no conflict of purpose between the two.

Incidental to the general purpose of protecting and promoting the public forests, the forestry laws provide a method for the removal and disposal of the "down timber" and surplus growth of these forests. Congress, to provide for the better protection of the title of the United States, prohibited the alienation of title to the land and the grant of permanent rights in and to said forests, but permitted the President of the United States to grant such temporary privileges as are "clearly necessary for the immediate government of the islands and indispensable for the interest of the people thereof." Such provisions of said General Orders, No. 92, as are inconsistent with this personal and immediate responsibility of the President are in conflict with said enactment, and are thereby rendered null and void.

Independent of this statute there rests upon the President of the

United States the duty of protecting and preserving the rights and property of the United States wherever located. This duty is especially imperative in territory subject to military government, for therein there is no division of responsibility, since all branches of government meet in the President as Commander in Chief of the occupying forces. Such provisions of said General Order, No. 92, as are intended to protect and preserve the interests of the United States in said forests are in harmony with said enactment and not affected thereby.

The Secretary of War approved the views expressed in the foregoing report, and the following reply to Judge Taft's dispatch of March 7 was accordingly sent:

MARCH 30, 1901.

With reference to your telegram of the 7th, it is considered provisions act Congress, March 2, do not interfere with established system forestry regulations provided for by Spanish law, as modified by military governor-general, orders 92, June 27, 1900. Full discussion of subject forwarded by mail. Advise General MacArthur.

Root.

TAFT, *Manila*.

In Annual Report of the Secretary of War for the year 1901, Secretary Root says (pp. 70, 71):

The full discussion of the subject referred to in this dispatch was contained in a report to the Secretary of War by the law officer of the Division of Insular Affairs, dated March 15, 1901, and a copy of this report is annexed hereto, marked Appendix F.

**IN RE CLAIM OF MESSRS. SOBRINOS DE HERRERA (NEPHEWS OF HERRERA) FOR PAYMENT OF DAMAGES OCCASIONED BY THE SEIZURE OF THE STEAMER SAN JUAN IN THE HARBOR OF SANTIAGO DE CUBA ON OR ABOUT JULY 17, 1898, BY THE MILITARY FORCES OF THE UNITED STATES.**

[Submitted November 25, 1901. Case No. 1216, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge and comply with your request for a report on the claim of Messrs. Sobrinos de Herrera for payment of damages occasioned by the seizure of the steamer *San Juan* by the military forces of the United States.

The facts out of which this claim arises, as set forth by the claimants, are as follows (see 1216, Div. Ins. Affrs.):

The steamer *San Juan*, a Spanish merchant vessel, engaged in the coastwise trade of Cuba, was detained in the harbor at Santiago by the blockade at that port. On July 17, 1898, this vessel was boarded by a detachment of United States soldiers under the command of an officer of the United States Army, who proceeded to establish and maintain a guard over said vessel and prevented all communication with the shore. On July 20, 1898, the captain and crew were required to take said vessel to Guantánamo under guard of two United States war ves-

sels, and on July 25 to return to Santiago. The subsequent proceedings are set forth by the claimants as follows (see 1216, Div. Ins. Affrs.):

That on the 26th day of said month, in obedience to orders, the said captain with an interpreter appeared before the general of the American Army in command at Santiago de Cuba and was by him informed that an American officer would immediately go aboard and assume command of the vessel; that against the protest of him, the said captain, such control and command was immediately taken, and he, together with the crew, was compelled to leave the said vessel, the *San Juan*; that no receipt for the delivery or surrender of the vessel was given.

This vessel so seized remained in the possession of the United States military authorities until May 18, 1899, on which day it was returned to the claimants.

It is a well-established and well-known fact that the War Department has jurisdiction to adjust and pay only such claims against the United States Government as arise on contract with the War Department which has been performed. (*Brannen v. United States*, 20 C. Cls., 219, 224; *Dennis v. United States*, 20 C. Cls., 119, 121; *McClure v. United States*, 19 C. Cls., 179, 180; *Satterlee, admrx. et al., v. United States*, 30 C. Cls., 51, 54; *United States v. Corliss Steam Engine Co.*, 91 U. S., 321; *United States v. Bestwick*, 94 U. S., 53.)

In order to bring this claim within the jurisdiction of the War Department, it would be necessary to have it appear that, at the time the vessel was seized, the military authorities waived the right of the United States to impress the vessel and intended to pay for the property or for its use; that thereafter the property was devoted to the use of the military service of the United States, and that the owner assented to such taking and use of the property.

A reading of the statement of the case, made herein by the claimants, makes it impossible to consider the claim as based on a mutual agreement or meeting of minds. The claimants are insistent, if not defiant, in asserting that instead of consenting they at all times protested against the vessel being taken and used by the United States, and instead of voluntarily turning over said vessel to the United States under contract or agreement, they were "compelled to leave," etc.

As a further evidence of their determination not to enter into or sustain contract relations with the United States Government with respect to said seizure and use of vessel, the claimants set forth in their application to the War Department (1216 Div. Ins. Affrs.)—

That on the 28th day of July, 1898, in the city of Santiago de Cuba, he, the said captain of the steamship *San Juan*, appeared before Don Pedro Secundino Silva y Fernandez, a notary, and made a deposition, duly executed and certified, setting forth the facts above stated and protesting against the seizure and detention of the vessel.

It affirmatively appearing that this claim does not arise on a contract with the military branch of the public service which has been performed, I am obliged to report that the application herein does not present an account which the War Department has jurisdiction to settle and pay.

## II.

In order that the Secretary of War may be fully advised as to this controversy, attention is directed to the fact that the action taken by the military authorities and the conditions existing at the time and place of the seizure plainly indicate that this vessel was seized either to prevent it from attempting to engage in traffic with the ports of Cuba at that time (July 17, 1898) blockaded by the United States, or to devote it to the uses of the military service of the United States without compensation, i. e., to impress it. Under the laws and usages of war either consideration justifies the seizure as a legitimate exercise of belligerent right. Therefore the only question involved is that of the authority of the United States to exercise belligerent rights at Santiago de Cuba on July 17, 1898. If history records an occasion when a nation might properly exercise such rights, it appears to the writer that Santiago de Cuba, July 17, 1898, affords a time and place when and where the United States might exercise them. Rightly or wrongly, the United States did exercise belligerent rights then and there. Persons considering themselves improperly dealt with by such exercise must apply to Congress for relief; it can not be provided by the War Department.

It is believed to have been the uniform practice of the War Department to abide by the well-established legal principle which precludes the executive branch of the Government from allowing claims for damages to property destroyed or injured in the common defense or due prosecution of war against public enemies.

(Mr. Belknap, Secretary of War, to Mr. Lawrence, February 24, 1874.)

If the person feeling aggrieved is a citizen of the United States, he may apply directly to Congress.

If he is an alien, he must present his claim to the State Department through diplomatic channels.

If he is a subject of Spain, consideration must be given to the provisions of the treaty of 1898, as follows (Art. VII):

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

## III.

The claimants, in their written application for relief (1216, Div. Ins. Affrs.), with reference to their demand for the return of the vessel to them, say:

That they, your said petitioners, based their requests on the principles and rules of equity and justice observed by all civilized nations, and more particularly on the above-mentioned proclamation of the President of the United States, two paragraphs of which are above set forth in full.

From this statement it would appear that the claimants contend that the seizure and detention were in violation of the laws and usages of war, as established by the practices of civilized nations. If such be the case, indemnity for such violation by the military authorities of the United States must be sought for in Congress or by civil suit in court against the individual guilty of the unwarranted action constituting the violation.

The proclamation of the President to which claimants refer was made on July 18, 1898, and can not be considered as having a retro-active effect.

The first of the two passages of said proclamation to which the claimants refer is as follows:

Private property, whether it belongs to private parties or to corporations, must be respected, and it may be confiscated only as indicated below. Means of communication, such as telegraph and cable lines, railroads and steamers, may be seized even though they belong to private persons or to corporations, but in case they are not destroyed for urgent motives they must not be detained.

This passage plainly contemplates that the military authorities in Santiago de Cuba might continue thereunder to exercise the right to confiscate, seize for the Army (impress), or destroy private property, the only limitation being that where property was seized for the temporary use of the Army it should not be detained after the purposes of the seizure were accomplished.

The second of the two passages in said proclamation to which claimants refer is set forth in the application, as follows:

The private property seized for the use of the Army shall be paid for in cash, if possible, after a just valuation, and when the payment in cash is not possible, *it shall be made in bonds.*

The words in italics do not appear in the order of the President. In that document the language used is, "receipts are to be given." (See G. O. No. 101, A. G. O., 1898.)

It will be noticed that this direction of the President is confined to one class of property, to wit, that seized "for the use of the Army," and clearly relates to subsistence, maintenance, and like matters. It can not be extended to require the military commanders then conducting active military operations in Cuba to pay for property not taken for the use of the Army, but seized, injured, or destroyed to promote the military operations or purposes of the war or to prevent the property being used by the enemy or to his advantage.

When it is considered that the property seized was not paid for in cash, nor its just valuation ascertained, nor a receipt given, it must be held (in the absence of any evidence to the contrary) that the military authorities making the seizure considered the seizure as a measure of public safety required by the military situation, and not a means of acquiring property for the use of the Army.

When the proclamation is read as a whole, it is apparent that the



President preserved the distinction pointed out by the Court of Claims as follows: (*Heflebower v. United States*, 21 Ct. Cls., 229, 237.)

There is a distinction to be drawn between property used for Government purposes and property destroyed for the public safety. If the conditions admitted of it being acquired by contract and used for the benefit of the Government, it may be regarded as acquired under an implied contract; but if the taking, using, or occupying was in the nature of destruction for the general welfare, or incident to the ravages of war, and whether brought about by casualty or by authority, and whether on hostile or national territory, the loss (in the absence of positive legislation) must be borne by him on whom it falls.

Even if the Secretary of War were of opinion that the seizure and detention of this vessel were clearly in violation of the laws and usages of war as theretofore accepted, or in violation of said laws and usages as interpreted, declared, amended, or otherwise made binding upon the United States Army by order of the President, he would still be without jurisdiction to determine and pay the amount of financial loss or damage occasioned by such violation. The Secretary has authority to prohibit a continuance or repetition of an alleged violation, but compensation for a violation imposed must be afforded by Congress. (5 Dec. Comp. of Treas., 693, 694; 7 Dec. Comp. of Treas., 517, 523.)

I therefore recommend that the claimants be advised that the War Department is without jurisdiction to consider and determine the matter presented by their application.

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### **REPORT ON THE DUTY COLLECTIBLE ON THE WRECK OF A STEAMER BROUGHT INTO PORTO RICO AND THERE SOLD WHILE THAT ISLAND WAS UNDER MILITARY GOVERNMENT.**

[Submitted September 12, 1899. Case No. C-324, Division of Insular Affairs, War Department.]

#### **SYNOPSIS.**

Duty should not be collected on the wreck of a vessel brought into a port of Porto Rico if the wreck is to be restored and continued as a vessel. Duty should be collected if the wreck is broken up and treated as material for consumption in Porto Rico.

SIR: I have the honor to acknowledge the receipt of your request for a report on the question as to whether the wreck of a vessel brought into Porto Rico and there sold is dutiable, and if so, at what rate. In compliance with said request I have the honor to submit the following:

The question is presented to the Department by an inquiry from the collector of the port of San Juan, as follows:

What duty collectible on wreck British brigantine caused by recent hurricane, sold auction by British vice-consul?

In the *Conqueror* (166 U. S., 110) the court held that a foreign-built vessel, purchased by a citizen of the United States and brought into the waters thereof, is not taxable under the tariff laws of the United States, for the reason that there is no mention of vessels *eo nomine* in

our tariff acts and no general description under which they could be included (p. 115); also for the reason that our Government has always treated vessels as *sui generis* and subject to an entirely different set of laws from those applied to imported articles (p. 118).

These reasons do not apply to the tariff regulations of Porto Rico. (See pp. 69-70, Tariff Regulations for Porto Rico.)

In *United States v. A Chain Cable* (2 Sumn., 362) it was held that a chain cable was not taxable which was purchased at Liverpool by the master of the ship *Marathon* to supply the place of a hempen cable which had become unseaworthy if the cable were purchased *bona fide* with the intention of using it for that ship and not to sell as merchandise. The cable in question was so used on the ship. Judge Story said that the words "goods, wares, and merchandise," as used in the tariff act, included only such as were designed for sale, or to be applied to some use or object distinct from their *bona fide* appropriation to the use of the ship in which they are imported.

In the brig *Comcord* (9 Cranch., 387), the court held:

Where goods are brought by superior force or by inevitable necessity into the United States they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of its property, they become retroactively liable for the payment of duties.

In the *Gertrude* (3 Story, 68) it was held that the tackle, apparel, and furniture of a foreign vessel, wrecked upon our coast, and landed and sold separately from the hull, were not goods, wares, and merchandise imported into the United States within the meaning of the revenue laws. This seems to have been adopted as the rule for Porto Rico. (See note p. 70, Tariff Regulations for Porto Rico.)

It is therefore recommended that the collector at San Juan, P. R., be advised as follows: The tackle, apparel, furniture, etc., of a vessel wrecked at sea are exempt from duty. (See note, p. 70, Tariff Regulations.) Duty on the wreck of a vessel should not be collected if the wreck is to be restored and continued as a vessel. If the wreck is broken up and treated as material for consumption in Porto Rico, collect duty assessed upon the price for which the property sold at auction if regular appraisement is impracticable. If appraisement is practicable, fix duty by following formula: Dutiable value is to price realized as 100 is to 100 plus the rate of duty.

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The Secretary of War approved the views set forth in the foregoing report, and the collector of customs at San Juan, Porto Rico, was instructed as follows:

SEPTEMBER 12, 1899.

The tackle, apparel, furniture, etc., of a vessel wrecked at sea are exempt from duty. (See note, p. 70, Tariff Regulations for Porto Rico.) Duty on wreck of vessel should not be collected if the wreck is to be restored and continued as a vessel. If the

wreck is broken up and treated as material for consumption in Porto Rico, collect duty assessed upon the price for which the property sold at auction, if the regular appraisalment is impracticable. If the appraisalment is practicable, fix duty by the following formula: Dutiable value is to price realized as 100 is to 100 plus the rate of duty.

ELIHU ROOT,  
*Secretary of War.*

DAVIS,  
*Collector, San Juan, P. R.*

**THE RIGHT TO DISPOSE OF THE MONEYS FOUND IN THE SPANISH TREASURIES IN MANILA AND SEIZED BY THE MILITARY FORCES OF THE UNITED STATES WHEN THAT CITY WAS CAPTURED.**

[Submitted October 14, 1901. Case No. 3453, Division of Insular Affairs, War Department.]

SYNOPSIS.

1. Property lawfully captured in enemys' country by the military forces of the United States instantly becomes the public property of the United States, and the right to dispose thereof is vested in Congress.
2. Neither the military authorities of the United States nor the officials in charge of the government of civil affairs in the Philippines are authorized to exercise said right of disposal.

SIR: I have the honor to acknowledge and comply with your request for a report on the right to dispose of the moneys found in the Spanish treasuries in Manila and seized by the military forces of the United States when that city was captured.

The question is presented to the War Department as follows:

When the city of Manila was occupied by the military forces of the United States, there were found in the several public treasuries situate therein funds aggregating 1,273,874.87 Mexican dollars. Included in said funds were a larger number of copper coins of Spanish mintage. These funds were seized by the Commander of the military forces of the United States as lawful prize of war, and said moneys were retained by the United States upon the conclusion of a peace. This money was placed in the custody of the "insular treasurer," an official of the military government of the Philippines.

For the purpose of supplying the demands of trade in the islands for coins of small value, Major-General Otis authorized the insular treasurer to exchange \$600 of this coin per week for local currency at par.

The Philippine Commission formulated a bill for an act repealing said order of Major-General Otis, and authorizing the sale of said Spanish copper coins to the highest bidder. This bill was referred to Major-General MacArthur, military governor, by the Commission, and he expressed his disapproval of the proposed legislation as follows:

The sale of the copper coinage as proposed would doubtless prove advantageous to all concerned, but it is thought the prior action of Congress is necessary to convert such coinage or the proceeds of the sale thereof into an asset of the insular treasury, (Ind. of June 12, 1901.)

Upon consideration of the objection made by Major-General MacArthur, the Commission voted to refer the question involved to the Secretary of War. (See resolution of July 22, 1901.) In the letter transmitting the papers, William H. Taft, civil governor, says:

Personally I have very grave doubt upon the point. If the funds are captured funds, as they doubtless were, they would seem to be the property of the United States Government and available for disposition by no other authority than that of Congress. As the question is consequently recurring, however, it is thought best to obtain an authoritative expression of opinion. (Taft letter, July 31, 1901.)

Upon examination of the subject I concur in the opinion expressed by Major-General MacArthur, military governor, in his indorsement of June 12, 1901, for the following reasons:

Article VI, section 69, of the Regulations for the Army of the United States provides that—

All property, public or private, lawfully taken from the enemy or from the inhabitants of an enemy's country, by the forces of the United States, instantly becomes the public property of the United States, and must be accounted for as such. Property captured or taken by way of requisition belongs to the United States, and can not, under any circumstances, be appropriated to individual benefit.

Article I, section 8, of the Constitution, confers upon Congress the authority—

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

Article IV, section 3, of the Constitution provides that—

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Congress has sedulously guarded the authority so conferred. From many instances showing the vigilance with which Congress protects this authority I select one which resulted from the military occupation of Mexico in 1847. As the cities of Mexico were severally occupied by the forces of the United States, the officers in command imposed and collected duties on goods and merchandise brought into the territory subject to their jurisdiction. The money so secured was collected as military contributions or requisitions for the use and benefit of the United States. In this respect the fund so created resembled captured property and differed from the funds derived from the collection of customs in the Philippines, for those funds are intended for the use and benefit of the archipelago. The money collected in Mexico was not converted into the Treasury of the United States. On the contrary, President Polk used it, as his discretion determined, "toward defraying the expenses of the war."

When the accounts of the disbursing officers (who had disbursed the funds pursuant to directions from the President) reached the Treasury Department they were disapproved as being disbursements of money belonging to the United States without authority of law. Congress was

called upon to provide the legislation necessary to secure approval of said disbursements. The authority of President Polk to dispose of said funds was challenged in Congress. (Cong. Globe, vol. 20, p. 57.) The matter was referred to a special committee, which submitted a majority report denying that the President had the authority exercised, and a minority report sustaining the President. (See Reports of Committees, 2d sess., 30th Cong., Report No. 119; Mess. of Pres. Polk to Cong., Jan. 2, 1849, Richardson's Comp., vol. 4, p. 672; discussion of message, 20 Cong. Globe, pp. 148, 639.)

The matter was finally adjusted by the passage of an act entitled "An act to provide for the settlement of the accounts of public officers and others who may have received moneys arising from military contributions, or otherwise, in Mexico." (9 Stats., 412.)

With reference to the property of the United States in Porto Rico, acquired during the war with Spain, the Attorney-General advised the Secretary of War as follows:

The power to dispose permanently of the public lands and public property in Porto Rico rests in Congress, and, in the absence of a statute conferring such power, can not be exercised by the executive department of the Government. (22 A. G. Op., 545.)

In his instructions to the Philippine Commission the President said:

That part of the power of government in the Philippine Islands which is of a legislative nature is to be transferred from the military governor of the islands to this Commission, to be thereafter exercised by them in the place and stead of the military governor. \* \* \* Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for the raising of revenue by taxes, customs, duties, and imposts; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military governor is now competent to provide by rules or orders of a legislative character. (See p. 4 of instructions of April 7, 1900.)

It appears to the writer that the authority of the Commission to legislate on matters affecting the property rights of the United States in the Philippines is no greater than was theretofore possessed by the military governor and does not include the right to dispose of this property.

## II.

Under the Spanish régime in the Philippines persons called upon to give bonds, such as are ordinarily required from civic officials, public contractors, trustees, guardians, and on appeals in legal proceedings, were permitted to deposit in specified public treasuries a sum of money in lieu of the required bond.

Since the transfer of sovereignty in the Philippines a number of claims have been presented to the United States based upon allegations that the claimants, prior to the transfer of sovereignty, had made such

deposit in some one of the several Spanish public treasuries of the Philippines; that the money so deposited was and continues to be the property of the claimant; that it was a special deposit, whether so designated or not, and the title to the money itself remained in the depositor; that the United States seized this private property and should now return it.

The records in the division of insular affairs, War Department, relating to the fiscal affairs of the Philippines, although incomplete, show that the \$1,123,910.10 (Mexican) "seized funds" deposited with the treasurer of the islands includes \$149,964.77 (Mexican) "special deposits." I have been unable to secure information as to the form or procedure in which these special deposits were made. In view of the claims presented to the United States and the allegations in support thereof, it is advisable that the Government of the United States retain the property, preserving all indicia of ownership as they were at the time the property was seized, until the questions of ownership and final disposition are determined.

I therefore recommend—

1. That the order of Major-General Otis permitting the treasurer of the islands to exchange \$600 of said coin per week for local currency be rescinded.
2. That the Philippine Commission be advised that the War Department considers the passage of "An act providing for the sale of Spanish copper coin in the insular treasury" unadvisable until authorized by Congress.

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The views expressed in the foregoing report were approved by the Acting Secretary of War, and the government of the Philippine Islands was advised as follows:

3453]

OCTOBER 15, 1901.

SIR: I have the honor to acknowledge the receipt of your letter dated July 31, 1901, transmitting a copy of a bill for "An act providing for the sale of Spanish copper coins now in the insular treasury," which proposed act is transmitted prior to its adoption by the Commission, pursuant to resolution of the Commission passed July 22, 1901, copy of which is attached to your letter.

I note the objections to the proposed act offered by Major-General MacArthur, military governor, and the statement in your letter that "Personally, I have very grave doubts upon the point" involved.

In response to your request for "an authoritative expression of opinion" by the War Department, permit me to say that, upon consideration of the matters and questions involved, determination is made as follows:

1. The property rights acquired by the seizure as prize of war of the moneys found in the Spanish treasuries in Manila upon that city being occupied by the military forces of the United States belong to the people of the United States in their federated capacity, and the authority to dispose of property so acquired is vested in Congress. Neither the military authorities of the United States nor the officials

administering the government of civil affairs in the Philippines are authorized to divest the United States of its title to said property.

I therefore am of opinion that the adoption by the Philippine Commission of the proposed "Act providing for the sale of Spanish copper coins in the insular treasury" is inadvisable until authorized by Congress.

I am also of opinion that the order heretofore issued by Major-General Otis while he was military governor directing the insular treasurer to exchange \$600 of this coin per week for local currency at par should be rescinded, and have so advised Major-General Chaffee. (Copy inclosed.)

The questions presented herein were referred to the law officer, Division of Insular Affairs, War Department, for report. I inclose copy of his report, to which your attention is directed.

Very respectfully,

WM. CARY SANGER,  
*Acting Secretary of War.*

HON. WM. H. TAFT,  
*Civil Governor of the Philippines.*

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**IN RE CLAIM OF DON J. ANTONIO MOMPÓ Y PLÁ FOR THE RETURN  
OF AN ALLEGED EXCESS OF DUTIES AMOUNTING TO \$5,624.15  
IMPOSED AT MANILA ON A SHIPMENT OF WINE LANDED AT  
THAT PORT.**

[Submitted November 22, 1901. Case No. C-1165, Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge and comply with your request for a report on claim of Don J. Antonio Mompó y Plá for the return of an alleged excess of duties amounting to \$5,624.15 imposed at Manila on a shipment of wine landed at that port. The Spanish minister at this capital presents this claim to the State Department and the Secretary of State forwards copy of the note of the Spanish minister to the Secretary, with a request that you obtain for the State Department a report as to the facts involved.

Copy of the communication from the Secretary of State and inclosures was forwarded to the military governor of the Philippines for report. A copy of his response is hereto attached, marked "A."

The claim arises as follows:

On the 2d of March, 1898, one Don Angel Ortiz placed an order, by telegram, with the claimant, Don J. Antonio Mompó y Plá, a wine producer in Spain, for monthly shipments of 300 quarter casks of "La Fama" wine.

Pursuant to said order, Mompó, on October 3, 1898, shipped to Ortiz, at Manila, 500 quarter casks of said wine, per steamer *Isla de Luzon*, and on October 31, 1898, Mompó shipped to Ortiz 400 quarter casks of said wine per steamer *Leon XIII*.

Both consignments arrived at Manila in January, 1899. The customs officials at that port required the payment of duties on said wine in accordance with the requirements of the customs tariff and regula-

tions for the Philippine Islands adopted by the United States authorities. The amount required by said regulations was \$7,327.94, which was paid.

The contention of the claimant is that said wine should have been admitted into the port of Manila upon payment of the customs duties fixed by the Spanish schedules on imports brought into the Philippines from the Spanish Peninsula. The claimant asserts that under said Spanish regulations the amount which could be assessed lawfully was \$1,703.79, wherefore the claim of excess charges to the amount of \$5,624.15.

Although not stated in the note from the Spanish minister, it is assumed that the claimant bases his claim upon the theory that import duties at Manila should be fixed in harmony with the regulations in force at said port at the time the wine was shipped from Spain, to wit, October 3 and October 31, 1898, instead of the regulations in force at said port at the time the shipment arrived therein, to wit, January, 1899. Such is not the rule prevailing in the United States, nor the rule adopted by the Philippine government. The rule in the United States is that importations are liable for the payment of import duties pursuant to the provisions of the general law in force at the time the goods arrive at the custom-house, unless excepted from its operation by affirmative provisions. This rule has been adopted in the Philippines, and, being in harmony with the established rule of the Government of the United States, should be sustained.

The tariff regulations in force at Manila in January, 1899, were those which went into effect November 10, 1898, by virtue of General Order No. 10, office military governor Philippine Islands, October 26, 1898. These regulations do not accord a preferential rate to goods coming from Spain, but require that duty shall be collected in uniform manner, as therein prescribed, regardless of the country of origin or the place of export.

The claimant insists that the exemption for which he contends results from the provisions of General Order No. 6, office military governor Philippine Islands, dated September 29, 1898. The provision relied on is as follows:

That all goods and merchandise secured or purchased within the dominions of Spain (the Philippine Islands excepted) since April 25 last, the date of formal declaration of war by the United States Government between that country and the Kingdom of Spain, shall be received into this port upon the same conditions as to payment of tariffs and duties as the goods and merchandise of strictly neutral nations.

For a time after the American occupation of Manila the customs duties at that port were collected in accordance with the rates fixed by the Spanish schedules. These schedules discriminated in favor of merchandise brought from the Spanish Peninsula. When the United States military authorities opened the port of Manila to foreign com-



merce, merchandise brought from Spain continued to enjoy this preferential rate until October 29, 1898, when the order above referred to was promulgated. The military authorities enforcing customs duties at Manila deemed it advisable to continue said preferential rate as to goods which had been secured or purchased in Spain for importation into the Philippines prior to the declaration made by the United States that the condition of war existed between the United States and Spain (April 25, 1898).

This discrimination was a privilege, a favor, extended by the Government under military occupation. It could be withdrawn at the pleasure of the military authorities. At the time the privilege was granted the conditions of actual war between Spain and the United States existed in the Philippines. That condition existing, all trade between the territories of the respective belligerents became unlawful, except as specially licensed by the proper authorities. The port of Manila being at that time subject to military occupation by the forces of the United States, trade therein was subject to regulation by the military authorities of the United States. The order of September 29, 1898, withdrew the privilege from all goods imported from Spain which were "secured or purchased" after April 25, 1898, and it was only by inference and practice that the privilege was continued as to goods secured or purchased prior thereto. The order of September 29, 1898, clearly contemplated that the privilege as to such goods should be exercised prior to November 10, 1898, the date fixed for the going into effect of the tariff schedules then undergoing revision. These schedules and regulation becoming effective, privileges inconsistent therewith could not thereafter be enjoyed. Such would be the rule if the privileges asserted rested on prior orders of the military government, and must be the rule where the privilege rests on a practice resulting from expediency.

## II.

The attention of the Secretary is directed to the fact that there has been received at the War Department a transcript of proceedings by a military board sitting in the Philippines, to whom was referred a claim for \$5,624.15 excess import duties, made by Mr. Angel Ortiz, of Manila, asserted to have been paid by him on certain Spanish wine brought by him into Manila in January, 1899. From said proceedings it clearly appears that the claim presented by Ortiz is for the identical payment of duties on which Mompó bases the claim presented to the State Department by the Spanish minister at this capital.

It further appears in said proceedings that upon the arrival of said wine at Manila Angel Ortiz claimed to be the owner and importer thereof, dealt with the custom-house officials and cargo as such, paid the custom duties, and now seeks to recover the alleged excess as being illegally imposed against him.

Inclosed in the copy of the note from the Spanish minister, dated May 31, 1901, is a copy of a statement made by Don J. Antonio Mompó y Plá, certified to by the Austrian consul at Valencia, Spain, on January 12, 1899, wherein it is certified that on that date Juan Antonio Mompó—

declared solemnly and faithfully that Mr. Angel Ortiz, of Manila, had bought from him the following parcel of wine \* \* \* on the 10th of March, 1898.

This appears to be the identical wine on which the alleged excess duties were levied and paid. In fact, it can not be denied that at the time the duties were collected the wine was imported and the duty was paid by Angel Ortiz.

The basis of the claim now asserted by Mompó is, as stated in the note of the Spanish minister, that—

said excess of duties was charged to his account by Mr. Ortiz as being extraordinary and unforeseen, as well as unprovided for, when the sale of the merchandise was proposed and contracted for.

No showing is made that Mr. Mompó submits to such charge or that he has secured by assignment or novation the rights heretofore and now asserted by Ortiz.

Since the Philippine government received the amount in dispute from Ortiz, and has at all times dealt with said wine as his importation, it is not at liberty to recognize another as entitled to rights or benefits which he continues to assert should be paid to him.

### III.

In the note to the State Department, dated May 31, 1901, appear certain expressions which indicate that the Spanish Government entertains the belief that the wine shipped from Spain on October 3, 1898, per steamer *Isla de Luzon*, was passed through the custom-house at Manila upon payment of the duties under the preferential rate established by the Spanish schedules, and is thereby led to believe that a like privilege should have been accorded to the wine shipped October 31, 1898, per steamer *Leon XIII*.

When it is considered that the preferential rate is a *privilege*, revocable at the pleasure of the authority granting it, the establishment of the fact from which the deduction is derived does not establish the conclusion. But the fact asserted is not established. When Mr. Ortiz presented this claim on his own behalf, his written application set forth his action in ordering the monthly shipments of wine, the difficulty of securing opportunity for shipment, and continued as follows:

This opportunity was on board the steamer *Isla de Luzon*, that sailed from Spain October 3, 1898, and the shipment was 400 quarter barrels. The second shipment of 200 quarter casks, 180 barrels, and 40 octaves was made on the steamer *Leon XIII*, sailing from Spain October 31, 1898. Upon arrival of these goods at Manila I was

compelled by the collector of customs to pay full duties despite the General Order No. 6, signed by Major-General Otis.

\*       \*       \*       \*       \*       \*       \*

The entire sum paid by me to the United States customs as duties on these wines was \$7,327.94. The Spanish regulations would have compelled me to pay \$1,703.79.

\*       \*       \*       \*       \*       \*       \*

The difference between \$7,327.94 and \$1,703.79 is \$5,624.15, this being the amount I now ask to be refunded. (See No. 1165, Doc. 4, Div. Ins. Affrs.)

The transcript of the proceedings had in connection with this claim when presented by Ortiz does not show that anyone then asserted that the first shipment was permitted to pass through the Manila custom-house on different terms than were enforced against the second shipment.

It is of course possible that the facts are as stated in the communication from the Spanish minister. Therefore attention is invited to the advisability of the Secretary of War instructing the Philippine government to ascertain if said first shipment of wine passed through the Manila custom-house without payment of the full amount of customs duties required by the tariff schedules in force in the Philippines in January, 1899, and, if so, to require payment from the party liable therefor of the amount remaining due and unpaid.

#### IV.

The action of the United States in seizing Manila, subjecting it to military occupation, taking possession of the custom-house, and appropriating the revenues derived from trade with that port, constitute an act of hostility toward Spain, justified by the war at that time actually existing. On the day these duties were collected (January 2, 1899) the treaty of peace had not been ratified by either nation, and the requirement of the United States military authorities that a sum of money be paid to them as a condition precedent to the entry of said goods into Manila must be considered an act *flagrante bello*; being such, it is an incident of the late war, and was closed by the treaty of peace. It therefore does not seem to be a proper subject for discussion between the Government of Spain and the Government of the United States.

If the Government of Spain insists that the action of the United States military authorities involved herein was unwarranted and unjustifiable, and by reason thereof a subject of Spain suffered damage for which he is entitled to indemnity, then it would seem proper to call the attention of the Government of Spain to the stipulation of Article VII of the treaty of peace, as follows:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of

the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

By reason of the foregoing I am obliged to report:

1. That the claim of Don J. Antonio Mompó y Plá for the return of alleged excess duties imposed at Manila on a shipment of wine brought into that port in January, 1899, is not entitled to recognition or consideration by the Government of the United States.

2. That the views of the War Department and the reasons therefor be communicated to the State Department for the consideration of that Department in determining what answer shall be made to the note of the Spanish minister at this capital, dated May 31, 1901.

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The views expressed in the foregoing report were approved by the Acting Secretary of War and communicated to the State Department as the views of the War Department. (See War Department letter of November 22, 1901.)

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**IN THE MATTER OF THE APPLICATION OF THE WESTERN RAILWAY OF HABANA, LIMITED, FOR PERMISSION TO EXERCISE RIGHTS ALLEGED TO HAVE BEEN SECURED BY A CONCESSION FOR EXTENSION OF THE RAILWAY GRANTED BY THE SPANISH MILITARY AUTHORITIES IN CUBA, NOVEMBER 24, 1898.**

[Submitted April 21, 1900. Case No. 953, Division of Insular Affairs, War Department.]

I have the honor to acknowledge a communication from the Assistant Secretary in reference to the above-entitled matter as follows:

The legal representative of the Western Railway of Habana, Limited, desires a reference of this case to the Attorney-General by the Secretary of War. Is there any reason why his request should not be granted? And if not, favor this office with a form of letter to the Attorney-General asking for a legal opinion upon the questions involved.

As the matter of reference and the questions to be submitted to the Attorney-General must be determined by the Secretary of War, I have the honor to submit the following report in regard to the facts and questions of law involved herein for such use as it may afford him.

On October 31, 1857, the Government of Spain granted a concession for the construction of a railway from Habana to Pinar del Rio, in the island of Cuba. The road was constructed and operated and eventually became the property of the Western Railway of Habana, Limited, an English corporation, which is now and for many years has been the owner and operator of said railway.

On November 24, 1898, the secretary of public works and communications, Eduardo Dolz, in the name of the Spanish Governor-General of Cuba, Ramon Blanco, issued what purports to be a grant or concession authorizing the Western Railway of Habana, Limited, to extend its line to the town of Gaane, and in consideration that the company renounced any state guarantee of interest on the capital to be expended on the extension, it was accorded "exemption from import dues for the fixed and movable material to be employed in said extension, the gratuitous grant of lands belonging to the state or to towns which may be necessary for the construction and working of the line, and the right to compulsorily expropriate, by reason of public utility and after indemnity, lands belonging to private individuals which for the same purpose should be indispensable." (See pp. 3 and 4, doc. 1, Cus. and Ins. Div.)

On December 14, 1898, the Spanish Governor-General Castellanos (who had succeeded Blanco) suspended the carrying into effect of all concessions then recently made, among them being the one above referred to.

The Western Railway of Habana, Limited, now apply to the military authorities of the United States, charged with the conduct of civil affairs in Cuba, for permission to build and operate said extension, and for this purpose to exercise the rights and powers set forth in the grant issued by the Spanish authorities on November 24, 1898.

At the outset of this investigation an administrative question arises, as follows:

Shall the intervening government, now in charge of civil affairs in Cuba, permit the exercise of the rights claimed under this concession, even if it were conceded that the concession is a valid and existing one; or will said intervening government elect to require said right to be held in abeyance pending the establishment of a permanent civil government in said island?

This question is to be resolved by the Secretary of War in the exercise of his discretion.

As to the legal right of the Secretary of War to exercise his discretion in such matters, the Attorney-General has already given his opinion. In a letter to the Secretary of War of date July 10, 1899, the Attorney-General discusses the claim of Michael J. Dady & Co., that said corporation has an existing contract to pave and sewer the city of Habana; and also the demand made by said corporation to be allowed to proceed with the contract. In said letter the Attorney-General says:

If the authorities were convinced that Michael J. Dady & Co. had a vested right or a complete contract, it would be within their lawful province to suspend its execution, if they thought the public health or *other interests* required.

If the Secretary of War determines this administrative question adversely to the claims of the railway company, a reference of the questions involved to the Attorney-General will not be necessary.

In the absence of such determination, the questions presented, to my mind, by this application are as follows:

1. Did the original concession authorize the Western Railway of Habana, Limited, to construct and operate the branch or extension from Pinar del Rio to Guane, Cuba?

2. Did the original concession, together with the royal order of May 26, 1888, empower said company to "acquire lands of private ownership" by complying with the Spanish law of expropriation, in the construction of said branch line, and may such authority now be exercised by the company?

3. If the foregoing question is answered affirmatively, what procedure is to be followed in the exercise of said authority?

4. Did the original concession, together with the royal order of May 26, 1888, empower said company to acquire "lands belonging to the state whose acquisition shall be made under the conditions or provisions which they may enter into with the royal treasury" for the purpose of constructing said branch line or extension, and may said authority now be exercised by the company?

5. If the foregoing question is answered in the affirmative, what procedure is to be followed in the exercise of said authority?

6. Was the alleged concession for the extension of the railway, purported to have been granted by the Spanish governor-general of Cuba, Ramon Blanco, by the secretary of the office, Eduardo Dolz, on November 24, 1898, a valid concession, for the purposes therein stated, at the time it was issued?

7. Did the order of Governor-General Castellanos annul the alleged concession issued by Secretary Dolz, or simply suspend the exercise of rights created by said concession?

8. If the effect of said order was to simply suspend the exercise of rights under said alleged concession, did the suspension continue after Governor-General Castellanos ceased to exercise authority in Cuba?

9. Is the United States, while maintaining an intervening government in Cuba, required to recognize and respect said Dolz's concession as a valid and existing one?

10. If the United States is required to recognize and respect said Dolz's concession as valid and existing, is the Secretary of War authorized, empowered, or required to permit the exercise by said company of the rights purported to be conferred by the following provisions of said concession:

2. The concessionnaire company shall be exempt from import dues for the fixed and movable material to be employed in the said extension, such material being understood to be the rails, parts of an engine or engines complete, and the coaches and wagons, and also the wheels, axles, buffers, and brakes necessary therefor and the

material for the iron bridges and other material for the construction and working of the line.

3. The concessionnaire shall use gratuitously lands belonging to the State or towns which may be necessary for the construction and working of the extension line.

4. This line being declared of public utility by the law of the Kingdom of the 26th May, 1888, published in the Madrid Gazette of the 6th June of the same year, the concessionnaire company shall have the right to compulsorily expropriate after indemnity lands belonging to private individuals which may be indispensable for the construction and working of the line. (See p. 4, Doc. No. 1, "Concession for the extension of the railway.")

11. If the company possesses the right to now "compulsorily expropriate after indemnity lands belonging to private individuals," what procedure is to be followed in effecting the transfer of title and fixing the amount of the indemnity?

12. May a person or private corporation owning a concession authorizing the exercise of the right of expropriation of private property in Cuba, heretofore possessed by the Crown of Spain, continue to exercise said authority under the conditions now existing in the island, and thereby acquire title to property in regard to which said authority had not been exercised at the time Spanish sovereignty was withdrawn from Cuba?

13. Upon the presentation to the Secretary of War of a concession purporting to grant rights in Cuba, issued by an officer of the Spanish Government exercising general authority under Spanish sovereignty in the island, and permission sought to exercise said alleged rights, is the Secretary of War to presume that the officer who issued said concession acted within his authority and with the approval of the Crown of Spain, and that the issuance of the concession cured all defects of procedure, and the concession therefore *prima facie* valid, and relegate the questions to the courts of the island for determination when presented in controversies arising from the exercise of the alleged rights by the concessionnaire? (See *Mitchell v. U. S.*, 9 Pet., 715, 760; *U. S. v. Arredondo*, 6 Pet., 691, 728; *U. S. v. Peralta*, 19 How., 343, 347.)

14. Is the rule or its application controlled by the legislation regarding the Court of Private Land Claims? (26 U. S. Stats., p. 854; *Hayes v. U. S.*, 170 U. S., 637, 647; *Ely's Admr. v. U. S.*, 171 U. S., 220, 223, 224.)

While the foregoing questions are all involved herein, several of them may be easily determined by the Secretary of War. The first, involving the right to build and operate the desired extension of the road under the original concession, is to be answered by the interpretation of article 39 of said concession, and the royal order of May 26, 1888, for upon the provisions of these two instruments alone does the company base this much of its claim. Article 39 is as follows:

The Government reserves to itself the power to make new railway concessions, whether as extensions of that which the concessionnaires may construct or as branches

or offshoots thereof, it being understood that the work must be declared of public utility and use and for the service of private individuals. The concessionnaires shall not be able to oppose these extensions or junctions nor to claim therefor any indemnification of any kind, unless the same result in the interruption of transit or material damage is caused to the railway. If the concessionnaires should wish to construct the said branches or extensions, they shall have the preference in equality of circumstances. (See art. 39, p. 7, Trans. Orig. Concession.)

It seems apparent that by this article the Spanish Government reserved to itself the privilege of building the extensions, branches, or offshoots of this railway, instead of conferring it upon the concessionnaires. Nor did the concessionnaires derive any benefits from the royal order of May 26, 1888.

Under Spanish law a condition precedent for conferring upon the promoters of a project the authority to exercise the right of eminent domain and to grant a subvention is the official declaration that such project is a work of public utility. This requirement of the law was complied with as regards railways in Cuba by the adoption by the Spanish Government of a general plan of railways for the island of Cuba, whereby the several component lines were declared to be works of public utility. The general plan at first adopted did not include the extension under consideration. Subsequently this branch of this railway and also the one leading from the port of El Mariel to Artemisa were included in said general plan. This was done by the promulgation of the following royal decree:

ARTICLE 1. There is included in the general plan of railways of the island of Cuba that which starting from Pinar del Rio as a continuation of the Western Railway shall pass through San Luis, San Juan y Martinez, Sabalo, Guane, and Mantua, and terminate at the port of Los Arroyos, in accordance with the law of the 13th July, 1885; in the same manner shall be considered as included the branch which starting from the port of El Mariel shall unite with the aforesaid Western Railway at Artemisa, or in proximity thereto, passing through Guanajay.

ART. 2. By reason of the special situation of the lines which are isolated from the others of the general plan, the works may be submitted for tender independently of the general system. Wherefore, we command all tribunals, justices, chiefs, governors, and other authorities, civil, military, and ecclesiastical, of whatever class and dignity, to keep and cause to be kept fulfilled and executed the present law in all its parts.

Given at Barcelona the 26th May, 1888.

I, the Queen Regent.

The Minister for the Colonies, Victor Balaguer.

Attention is directed to the fact that the foregoing decree provides that "the works may be submitted for tender independently of the general system." This would indicate that the Government of Spain considered it had the right to "tender" or offer for sale the concession for said extensions, and that the original concessionnaires did not possess a vested right therein or thereto.

The action of the company in securing the issuance of a concession for the construction of this extension by the Spanish authorities on



November 24, 1898, would indicate that the company did not consider itself possessed of such right under the original concession.

If the first question is answered in the negative, the succeeding four questions are rendered immaterial, and the first five questions in the abovelist are eliminated from further consideration in this investigation.

The sixth question has reference to the validity of the concession granted on November 24, 1898.

By the general law of railroads for Spain and its dependencies, the concession for a railroad is required to be created by special act of the Cortes, upon the proposal of the Government. (Art. 27, Railroad Laws.)

The company claim that the general law was modified as to Cuba and the authority to grant such concession was conferred upon the governor-general of the island by royal order of May 5, 1895, and the royal order of June 26, 1895.

Copies of said royal orders are hereto attached marked "Exhibit A" and "Exhibit B."

Attention is directed to the fact that such authority as is thereby delegated was to be exercised as to certain railway projects therein designated.

The order of May 5, 1895, relates to the "railroad from San Luis to Palma Soriana, as a prolongation of Guantánamo road and that between Bayamo and Manzanillo." These towns are all at the eastern end of Cuba in the province of Santiago de Cuba.

Said order further relates to a proposed railroad from Puerto Príncipe to Santa Cruz del Sur. These towns are also at the eastern end of Cuba in the province of Puerto Príncipe.

The order of June 26, 1895, relates to the "grant to build a narrow gauge railroad between Puerto Príncipe and Santa Cruz del Sur."

These towns are also at the eastern end of the island, being in the province of Puerto Príncipe.

The concession for an extension of the Western Railway of Habana, now under examination, relates to a railroad between Pinar del Rio and Guanés, towns at the western end of the island in Pinar del Rio Province.

In the closing days of Spanish dominion in Cuba a large number of concessions were issued by the Spanish authorities, professedly in pursuance of law. The proceedings as to some of them were initiated during the existence of the late war, and as to others, the inception was prior to the war, but the consummation took place after the peace protocol of August 12, 1898.

In passing upon the validity of the alleged concession, issued to this company on November 24, 1898, it is necessary to determine—

(a) Had the Government of Spain authority and right to grant the the concession at the time the same was issued?

(b) Did the Spanish officials have jurisdiction to proceed in manner and form as was done and with reference to the subject-matter of the proceedings?

During the negotiations of the mixed commission for the arrangement of terms for the evacuation of Cuba, the attention of the representatives of the United States Government was called to the attempt, then being made, to dispose of concessions in Cuba. The information was communicated to Washington. The further proceedings in the matter were as shown by the following correspondence:

WASHINGTON, *December 12, 1898.*

Confer immediately with Spanish officials concerning proposed sale of railway, tramway, and other franchises, and notify them that United States objects and will insist that none be sold or granted. Report result of conference.

WILLIAM MCKINLEY.

The following letter was addressed to the governor-general of Cuba:

HABANA, *December 13, 1898.*

GENERAL: Referring to the granting or selling of railway, tram, and other franchises, as well as to the proposed sale on the 29th instant by the department of public works and communications of railway franchises on this island, I have the honor to state that under the instructions of my Government it becomes my duty to notify Your Excellency that the United States objects to such sales or grants of franchises, and will insist that no franchises of the character named, or of any kind of character, be sold or granted on this island.

I have the honor to remain, etc.

The following telegram was sent to the President:

HABANA, *December 14, 1898.*

General CORBIN, *Washington* (for the President):

In accordance with instructions, conferred with governor-general on matter of franchises. He stated that action complained of was taken by a secretary of the autonomic government without his authority; that he considered latter's action ridiculous and improper; that on the 16th instant he would assume supreme control of affairs and would then promptly revoke all such improper and unauthorized actions. He gave assurances that affairs would be conducted and concluded to the satisfaction of both Governments. Upon conclusion of conference, formal letter setting forth protest against action complained of was left with him. Report of final action by governor-general will be made in due time.

WADE, *Chairman.*

(See p. 146, Proceedings of Mixed Commission for Evacuation of Cuba.)

Attention is directed to the following letter and copy of order inclosed therein, sent by Governor-General Castellanos to Maj. Gen. J. F. Wade, president of the Commission for the Evacuation of Cuba.

GENERAL GOVERNMENT OF THE ISLAND OF CUBA,

*Habana, December 15, 1898.*

His Excellency Maj. Gen. J. F. WADE,

*President of the Commission for the Evacuation of the Island of Cuba.*

GENERAL: In answer to your attentive letter of the 13th instant, I have the honor to inform Your Excellency that some of the concessions and sales of tramways in this

island were made by the mayor of Habana and the civil governor of the province, with the consent of the secretary of "government," and the rest were granted by the secretary of public works, and all of them were effected without my knowledge.

Being informed of the matter, I am of the opinion that such concessions and sales are not proper, inasmuch as they would have force after the sovereignty of Spain will have ceased in this island, and convoking my secretaries have made them understand it thus, and have decreed the annulment of all the concessions and sales, which I so effect by the accompanying decree.

I am, Your Excellency, with the greatest consideration, etc.,

ADOLFO J. CASTELLANOS.

[Copy of translation of decree published in Official Gazette of Habana, December 15, 1898.]

#### DECREE.

By virtue of the faculties of my competency, in view of the circumstances and with the idea of avoiding damages to the interested parties in the announced auction sales, authorizations, and concessions made by the government and corporations (municipal) for the construction of railroads in this island and of tramways in this city, which would not be accomplished until after the Spanish sovereignty had ceased, in accord with my council of secretaries, I decree the following:

ONLY ARTICLE. The execution of the before mentioned auction sales, authorizations, and concessions is left in suspense, without prejudice to the rights which the parties interested in them consider they have in order to make them valid at the proper time and before the tribunals and authorities.

Given in Habana, December 14, 1898.

ADOLFO J. CASTELLANOS,

*The President of the Council of Secretaries.*

JOSÉ MARIA GALVEZ.

In the "Opinion of the Attorney-General as to tramway concessions, Habana, Cuba," delivered to the Secretary of War July 10, 1899, appears the following:

By a decree of December 7, 1898, one Dolz, secretary of public works and communications, assumed to make a decree by authority of the autonomist government, authorizing a company, etc.

\* \* \* \* \*

The decree issued by Dolz on December 7, 1898, is subject to some suspicion, because it was through this same Secretary Dolz that the public sale of almost all conceivable public franchises in Cuba was advertised to take place in the latter days of December, just prior to the possession of the island by the United States forces, a scheme so obviously conceived in fraud as to have compelled the military authorities to put a stop to it.

Being so admonished, this Department naturally views with suspicion the acts of said Secretary Dolz done and performed with reference to concessions and public property after the signing of the peace protocol of August 12, 1898. But the fact remains that he was an official possessing certain authority under the actual sovereignty exercising dominion in that locality; and this Department is beset with applications of persons claiming the right to exercise certain privileges alleged to have become vested in them by his official acts, which said claims

are in many instances supported by the representatives at this capital of foreign governments. It would be of great assistance if this Department were advised as to what, if any, presumption arises from the official acts of this official after August 12, 1898, and to what extent, if at all, credence is to be given thereto.

Questions 13 and 14 present the questions generally, and with reference to all Spanish officials in the island, without limitation as to the time of the action.

In this connection attention is directed to the action of the Secretary of War on the application of the owners of the concession to canalize the Matadero River from the Cristina Bridge to the bay of Atares for permission to exercise the rights granted by the concession. The Secretary of War decided thereon to recognize the concession as *prima facie* valid and existing and to remit the final determination of the question to the courts of Cuba, where the questions involved were to be determined without reference to the recognition by the Secretary. This course enabled the concessionnaires to attempt the exercise of the alleged rights and permitted any person, corporation, or municipality asserting conflicting rights or suffering damage to go into court and contest the rights asserted under the concession. The inception of the proceedings for the grant of that concession antedated the war (August 31, 1896) and were completed September 16, 1897, and certified to the Governor-General of the island October 1, 1897, for his approval, which was given on September 28, 1898, and concessionnaires had commenced the work and were in possession when the United States assumed control of the affairs in that locality. The action of the Secretary of War in that instance does not furnish a precedent for the one under consideration, if an order of a military government, made with reference to one matter and one emergency or condition of facts, could be said to establish a "precedent" as that term is used in legal proceedings.

The seventh and eighth questions are self-explanatory, and the order of Governor-General Castellanos, referred to therein, is hereinbefore set forth.

The ninth question is the administrative question already referred to, and is included in the list for the convenience of the Secretary of War in the event that he considers the question one on which he is not already sufficiently advised.

The tenth question contains three subdivisions. The first subdivision presents the inquiry, Would an exemption from payment of import duties, granted by the Spanish Government, afford immunity from the import duties levied by the government now existing in Cuba? To the writer it appears that this interrogatory must be answered in the negative, for reasons that are manifest. Such contract for immunity would be a special regulation of the relations between the

sovereign and the concessionnaire. Such regulation would be of no higher character than laws duly enacted for the regulation of the relation of the inhabitants with the sovereign, or of treaties respecting trade with the island.

In his opinion delivered to the Secretary of War, July 10, 1899, on the "Dady contract," the Attorney-General says:

By well-settled public law, upon cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which are designated as municipal continue in force and operation for the government and regulation of the affairs of the people of said territory until the new sovereignty imposes different laws or regulations. Those laws which are political in their nature and pertain to the prerogative of the former sovereignty immediately cease upon the transfer of sovereignty.

The provision of the concession now under consideration appears to be simply an agreement on the part of the sovereign that he will, as the occasion presents itself, exercise his prerogative and exempt the material and rolling stock of said railway from the customs duties which he usually imposes. (See art. 21, Concession for extension.) This authority is no longer exercised in Cuba by the Crown of Spain.

This agreement between the Government of Spain and these concessionnaires would probably not be considered as being of more binding force than a commercial treaty between Spain and another sovereignty. The attention of the Secretary of War is directed to the following quotations:

Hall on International Law (4th ed., 98) says:

Thus treaties of alliance, of guaranty, or of *commerce* are not binding upon a new state formed by separation. \* \* \*

Halleck on International Law (3d ed. vol. 1, chap. 8, sec. 35) says:

But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things.

The second subdivision of question 10 presents an interrogatory as to the continuance in force, after the relinquishment of sovereignty in Cuba by Spain, of the provision in the Dolz concession, that in the construction and operation of the proposed extension the company "shall use gratuitously lands belonging to the state or towns."

Attention is directed to the fact that this privilege is now sought to be exercised as to lands which were not occupied by the company at the time Spanish sovereignty was withdrawn from Cuba, and as to lands the title to which either remains in the towns or passed to the United States in trust for the inhabitants of the island.

The contention of the company is, that said provision constitutes a floating grant or roving commission, and that the United States received the public lands in Cuba charged with a lien in favor of the easement now asserted.

As to the public lands now held in trust by the United States for the inhabitants of Cuba, the question is, Did such lien attach prior to selection and occupation by the company? As to such property as may be owned by the towns of Cuba, the question is, Are said towns now required to surrender the use of their property in obedience to the royal orders of the Crown of Spain?

If this concession purported to convey the *title* to public property, it would seem that the Attorney-General had already sufficiently advised this Department as to the answers to these interrogatories.

The Attorney-General, in his opinion as to the application of Ramon Valdez for right to use water power of the River Plata, in Porto Rico, delivered to the Secretary of War, July 27, 1899, says:

It is well-settled law, and only needs to be stated to be understood, that when public property is ceded by one nation to another its disposition and control are thereafter regulated and governed not by the laws of the ceding nation but by the laws of the new owner. If, therefore, any substantial act remains to be done, resting in the grace, favor, or discretion of the Government, to secure to an applicant or alleged concessionary a franchise or right in public property thus ceded by one nation to another, such additional action must be obtained in accordance with the laws of the present and not of the former owner. If at the time the treaty of Paris took effect the applicant had a completed and vested right to the use of the waters of the river Plata, that right will be respected by the United States. If, however, his right had not been completed by the action or assent of the Crown authorities of Spain, then his right is not vested, but inchoate, and can not be made vested by the completion of those requisites prescribed by Spanish law.

\* \* \* \* \*

Those laws of the former government which have for their object a certain governmental public policy, of which character are laws for the disposition of the public domain and the granting of quasi public franchises, rights, and privileges to private individuals or corporations, ceased to have any force or effect after the sovereignty of the former government ceased. (*Harcourt v. Gailliard*, 12 Wheat., 523.)

If in the granting of a right or privilege the sovereign has retained an iota of authority which may affect its untrammelled exercise and enjoyment, the right is not of the nature of an absolute one, but wholly of an inchoate and imperfect quality. As to inchoate, imperfect, incomplete, and equitable rights, the succeeding sovereign is the absolute dictator. They can not be exercised against his sovereignty, but only by his grace, and his affirmative exercise is necessary to the validity of the concession.

By parity of reasoning it would seem that, if at the time the title passed from one sovereignty to the other, anything remained to be done by the concessionnaire which affected the untrammelled exercise and enjoyment of the right, then such right is not of the nature of an absolute one, and can not be exercised against the new sovereignty excepting by its grace extended by an affirmative act.

The honorable Attorney-General, in his opinion as to the application of Frederick W. Weeks to construct wharf, etc., at Ponce, P. R., delivered to the Secretary of War, July 26, 1899, says:

If constructed, the pier or wharf will be upon the public domain of the United States. I understand that, under Spanish law, lands under tide water to high water-

mark in ports and harbors in the Spanish West Indies belonged to the Crown. As Crown property, they were by the treaty of cession transferred by Spain to the United States of America, and are now a portion of the public domain of that nation. I do not know of any right or power which the Secretary of War or the President has to alienate in perpetuity any of the public domain of the United States, except in accordance with acts of Congress duly passed with reference thereto. There is no legislation by Congress made for or properly applicable to the public domain in Porto Rico. The power to dispose permanently of the public lands and public property in Porto Rico rests in Congress, and, in the absence of a statute conferring such power, can not be exercised by the executive department of the Government.

It seems clear that the geneaal rule announced by the Attorney-General is that when the Crown of Spain ceased to be the owner of said property it ceased to possess the right to alienate said property. The conveyance of such property as had been completely alienated prior to the cession is to be respected, but that uncompleted conveyances were nullified by the transfer of title to the United States; that the rights of individuals, created by uncompleted proceedings, are inchoate, and are dependent upon the acts of grace of the succeeding sovereign; that neither the Executive nor the Secretary of War is authorized to perform the necessary acts of grace until specially authorized so to do by Congress.

It is true that the title to Crown property in Cuba passed to the United States in trust for the people of Cuba, but it does not seem probable that the existence of the trust increases the power of the Executive and the Secretary of War in the matter of alienating said property. On the contrary, it would appear that the existence of the trust would impose additional limitations. (See opinion of the Attorney-General delivered to the President September 9, 1899, as to power of local authorities of the Hawaiian Islands to dispose of portions of the public domain.)

Usually the railway concessions granted by the Spanish Government which confer authority to occupy public lands or to exercise the right of eminent domain contain provisions which require the concessionnaire, before exercising such authority, to submit to the Crown authorities plans showing the right of way, the kind, quality, and extent of the lands to be occupied, together with the names of the owners, and specifications showing the details of construction. These plans and specifications must be approved by the authorities before the concessionnaire can exercise authority under the concession in regard thereto. In this way the government secured protection from the improvident use of the authority granted. In the original concession for this railway, and under which the road as now existing was constructed, the following appears:

ART. 7. With due anticipation before commencing the construction of each section of the road, the concessionnaires shall present to the Government the plans on a scale of 1-5000 of the definitive course of the line. In these plans shall be

denoted the positions and outline of the stations and sidings, the places for loading and unloading, and the kind, quality, and extent of the lands which may be occupied, with the description of the owners or proprietors thereof. There shall accompany this plan a longitudinal section through the center of the railway, the transverse sections, and state of the gradients, and that of the curves, their radius and amplitude, the description, plans, and estimates of the works, and a design of the system of roads which it is proposed to adopt.

ARR. 8. These documents being approved by the superior civil governor, the concessionnaires shall, at their own cost, make two copies which shall be legalized by the board of public works, one of which shall be delivered to them and the other to the office of technical inspection. They shall, besides, make a copy of the plan in the part comprising the zones of military defense in order to deliver the same to the office of the commandant of engineers of this garrison, so that it may exercise the supervision which appertains to it.

ARR. 9. The concessionnaires shall not make any modification in the route approved without the previous authority of the superior civil governor.

(See arts. 7, 8, 9, p. 2, trans. of original concession.)

There are also many other provisions in said concession calculated to protect the interests of the Government in this regard. Under these provisions it is manifest that until the required approval was secured the authorization was not complete and the right was not an absolute one, for the sovereign still retained authority which might affect its exercise, and under the rule declared by the Attorney-General in the Valdez opinion such imperfect rights are not enforceable until vitalized by the new sovereignty.

An examination of the concession for the extension, purporting to have been issued by Secretary Dolz on November 24, 1898, will disclose an absence of special provisions of the character above referred to. Undoubtedly the present government of Cuba would have the right to regulate and control the exercise of rights under this concession by reason of the character of the enterprise, the interests involved, and the far-reaching powers of a government having its inception in military occupation. This right of control will also arise from the general provisions of articles 14, 20, and 24. If this view is correct, it would seem as though the rule applied in the Valdez case is applicable herein, unless a distinction is made between a right to the *title* and a right to the use and occupation. In this connection attention is directed to the fact that the railway company was not in *possession* of the "lands belonging to the state or towns which may be necessary for the construction and working of the extension line" at the time Spanish sovereignty was relinquished; and the treaty of peace restricts the operation of its provisions regarding the impairment of property rights by reason of the relinquishment of sovereignty to "property or rights which by law belong to the peaceful *possession* of property of all kinds." (See art. 8, treaty, Dec. 10, 1898.)

The third subdivision of question 10 presents a question as to the exercise of the right of expropriation or eminent domain. The right



of eminent domain as here used means "the power in a state to take private property for public use." (6 How., U. S., 536.) Two theories are advanced as to the precise nature of this power. One maintains it to be a right reserved or estate remaining in the sovereign at the time of the original grant of private right, and its exercise is the resumption of original proprietorship. (3 Paige Ch., 73; 34 Conn., 78; 113 N. Y., 275.)

If this view is correct, it would seem to follow that when the sovereign title to all the land in Cuba was transferred to the United States in trust such title was received in the same condition as was the title to land in which the Crown of Spain held the sovereign and proprietary or private rights, and the rule applied to public lands should be applied to the public rights in private lands. This rule has already been discussed herein.

The other doctrine maintains the right to be an attribute of sovereignty and in no sense an interest or estate. Numerous arguments are advanced in support of this contention, the principal one being that personal property, in which the state never had any title, is subject to the right. (Lewis, Em. Dom., sec. 3; Rand, Em. Dom., sec. 3.)

The latter doctrine is probably the better received in the United States and the former in Spain. (8 Op. Atty. Gen., 333.)

It is not necessary to a proper determination of the matters involved in this application to determine the exact origin of the right or source of the power, for under both doctrines the exercise of the power in Spain and its dependencies is a prerogative of the Crown. When the privilege of exercising it is conferred upon a concessionnaire it still remains a crown prerogative. The concessionnaire becomes the agent of the crown for a special purpose, and his authority is similar to that exercised under a power of attorney. (4 Thomp. on Corp., ch. 122.) If by conveyance or otherwise the principal is divested of the authority thus delegated, the agent is also. Strictly speaking, it is not accurate to say that the state delegates a right of sovereignty of which it can not divest itself; hence it is more exact to speak of the state exercising this power through an agent. When the Crown of Spain relinquished sovereignty in Cuba, it relinquished the prerogative rights relating thereto or derived therefrom. (Op. Atty. Gen. on "Dady contract," July 10, 1899.)

If it shall be determined that the company can not now exercise the right to "use gratuitously lands belonging to the state or towns," nor to "compulsory expropriate" lands belonging to private individuals, it will not be necessary to pass upon question 11. If the contrary rule prevails, question 11 becomes important, as it is necessary to provide a procedure by which the rights may be exercised, since the Spanish laws regulating the same were annulled by the relinquishment of

sovereignty. The Attorney-General has advised this Department as follows:

By well-settled public law upon the cession of territory by one nation to another, \* \* \* those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. \* \* \* The authority and power of the Crown and of the Crown officers in such instances did not pass to the officers of the United States, because the royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide. (Op. Atty. Gen. on "Dady contract," July 10, 1899.)

Regarding the authority of the government existing in Cuba to prescribe a procedure whereby the municipalities of the island may exercise rights and municipal officers discharge their functions, the Attorney-General says:

Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the proper authorities of the United States may change or modify either the form or the constituents of the municipal establishments; may, in place of the system and regulations that formerly prevailed, substitute new and different ones. Upon this line the same authorities, exercising sovereignty over the island, have the power to provide the methods, terms, and conditions under which municipal improvements, which relate entirely to property belonging to the municipality or held by it for public use, may be carried on. The old provisions of the Spanish law may be adopted, so far as applicable, or they may be entirely dispensed with, and a new system set up in their place. The municipal authorities of Habana, in the matter of engaging in the construction of public works, may be permitted to proceed under such law as is now applicable, if that be adequate, or they may, at the will of the military commander, be restrained from engaging in any such works, or from permitting any such works to be carried on, although inchoate or even completed contracts therefor have previously been entered into.

In the event it is determined that this company may now exercise the rights claimed, it will be necessary to determine to what extent such exercise may be controlled.

Question 12 presents in *general* form the same question in regard to the exercise of the right of eminent domain as is presented as a special instance in question 10. Both forms are included for the convenience of the Secretary of War in determining the form of interrogatory, should he desire to present the matter to the Attorney-General.

In this connection, the attention of the Secretary of War is directed to the theory that the right to appropriate private property for the use of the public without the consent of the owner is a right which belongs to the *public*, or to society in its associated or federated capacity; and is derived from the relation which such association sustains to the individual members thereof; the exercise of which right is justified by the established principle that the necessities of society overcome

the private rights of individuals. Under this doctrine the authority of the government is that of regulating the exercise of an existing right which society possesses under all governments, or in the absence of any governmental entity or governmental regulation of such right. Under this doctrine the public, or society, in Cuba would have the same right to appropriate property for the construction of a railroad (the necessity for such road being actually existing) as it would have to enter upon private property to arrest the spread of a conflagration, a flood, or other other imminent peril.

Question 13 seeks to present the matter of what presumptions arise from the actions of Spanish officials in granting concessions in Cuba.

This question was examined and discussed in the report on the concession to canalize the Matadero River, etc., above referred to. The authorities referred to in said report have been inserted as a note to the statement of the question formulated herein.

The question is raised herein in a report on this application made by the secretary of agriculture, industries, commerce, and public works under the administration of civil affairs in Cuba of Major-General Brooke. From said report the following is quoted:

First. The colonial Spanish government of Cuba granted this concession after Spain relinquished its sovereignty over the island. The granting took place precisely when all the special faculties invested in the governor-general by the royal orders of May 5 and June 26, 1895, to save at any cost the political interests of the metropole, had already disappeared, together with said sovereignty.

Second. The Spanish law (the Law of Estimates for 1880-81), according to which the concession ought to have been granted, was violated in the important respect of the public auction.

Third. The same colonial government which made the concession on November 24, 1898, did dictate the suspension thereof twenty days after, on the same date, (December 14, 1898) on which all kinds of proceedings were stopped, with the view to turning over to the United States the administration of the island.

The question is therefore very easy to resolve. Legally the concession must be rejected, but on the ground of equity to the company and of the convenience for the island, it could be accepted, if legalized by means of public auction, according to the law mentioned above.

(See second indorsement, Doc. 2.)

In regard to this report and the concession and application now under consideration, Major-General Brooke, as military governor of the island, says:

The right of the Spanish governor-general of Cuba to grant this concession at the date he did is not only questionable, because he was acting under authority of "special powers," conferred upon him on account of "the exceptional circumstances" existing in the island, which were undoubtedly the troubles arising from the rebellion of the Cuban people which resulted in the loss of sovereignty over the island by Spain, which powers he was not authorized to use after the protocol was signed, said condition not then existing, but also because even if he did exercise them it was not conceded that he had the right to grant concessions (and that, too, outside the terms of the law) which would extend to another sovereignty, or that he could bind

the succeeding government to its conditions. Nor was the concession apparently completed by the final approval of the proper Spanish authority in Madrid; and it is also included among those suspended by the decree of the captain-general of December 14, 1898, above referred to.

It is possible, however, that, as suggested by the secretary of agriculture, commerce, industries, and public works, if the terms of the concession are favorable for the government, and the work is one which should be proceeded with in the interests of the people of the island, it may be considered, not as void, but "voidable" *at the option of the government*, and so far an actual concession as to be made legal by the ratification of the proper authority of the succeeding sovereignty.

(See letter August 22, 1899.)

The attention of the Secretary is respectfully directed to the written argument and brief of authorities, filed herein by the applicants, in support of said application.

If the Secretary desires to refer this application to the Attorney-General and will indicate the questions to be presented, I will be pleased to prepare draft of letter of transmittal and inquiry.

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The Secretary of War requested the opinion of the Attorney-General on the questions set forth and discussed in the foregoing report. Prior to the receipt of the Attorney-General's response, the railway company withdrew its application.

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**IN RE CLAIM MADE BY THE GOVERNMENT OF SPAIN, THAT  
PARAGRAPH 14, OF GENERAL ORDERS, NO. 19, ISSUED BY THE  
MILITARY GOVERNOR OF PORTO RICO, IS IN VIOLATION OF  
ARTICLE XII OF THE TREATY OF PEACE BETWEEN THE  
UNITED STATES AND SPAIN.**

[Submitted July 24, 1899. Case No. 773, Division of Insular Affairs, War Department.]

SIR: The attention of this Department is directed to this matter as follows: The Department of State received a note from the French embassy at this Capital, inclosing a memorandum having reference to said order issued by Major-General Brooke. The Department of State submitted the matter to the Attorney-General. A reply was received by the Department of State from the Attorney-General, stating that as Porto Rico is at present under the control of the military authorities, we would respectfully suggest that the matter be submitted to the War Department. Thereupon, the Department of State, by letter dated May 10, 1899, transmits to this Department copies of the note from the French embassy and the memorandum of the Spanish Government, therein contained.

The purpose of said General Orders, No. 19, against one section of which said memorandum is directed, is to define the duties and jurisdiction of the supreme court of justice for the island of Porto Rico.

These duties and jurisdiction as set forth in paragraph 1 of said order, are as follows:

1. The full bench of the supreme court of justice, consisting of seven magistrates, including the president, shall hear all the appeals pending decision, as well as those that may hereafter be established and are authorized by the laws of civil and criminal procedure, which, under the Spanish régime, devolved upon the supreme court of Madrid, whose jurisdiction regarding this island ceased by virtue of the peace protocol.

Attention is directed to the fact that this order was issued December 2, 1898, eight days prior to the completion of the negotiation of the treaty of peace at Paris, December 10, 1898. Upon the treaty of peace being signed, ratified, and proclaimed, so much of said order as was contrary to or in violation thereof became null of force and void of effect.

The particular paragraph to which attention is directed reads as follows:

IV. The appeals forwarded to and still pending decision at the aforesaid supreme court of Madrid shall be claimed through diplomatic channels, without detriment to the action taken for that object by the parties concerned; and upon their return shall be transferred to the hearing of the supreme court of justice.

It will be noticed that the language used in said paragraph does not confer a present jurisdiction upon the court of cases forwarded from said island and pending decision on appeal at the supreme court of Madrid. The language is declaratory of an intention to apply, through diplomatic channels, for a return of cases forwarded on appeal from said island to the supreme court of Madrid. If the applications were successful and the cases were returned, then, and in that event, the jurisdiction of the supreme court of justice for the island of Porto Rico would attach, and the appeal would thereafter be heard, without prejudice to the rights of the parties concerned.

What disposition should be made of judicial proceedings pending in the territories relinquished and ceded by Spain in the treaty of peace was the subject of diplomatic negotiations by the Peace Commission which formulated the treaty, and resulted in the provisions of Article XII of that instrument. If application should hereafter be made for return of the cases pending in the supreme court of Madrid, the meaning and extent of the provisions of Article XII of the treaty of peace will then be considered.

It does not appear that the supreme court of justice for the island of Porto Rico has attempted to exercise jurisdiction in any judicial proceeding now pending decision at the supreme court of Madrid on appeal from that island. This Department can not presume that the supreme court of justice for the island of Porto Rico will attempt to exercise an unauthorized jurisdiction. The action of a court without jurisdiction is of no avail on the one hand or injury on the other. If it shall

hereafter appear, during the existence of the military government in any of the territories ceded or relinquished by Spain, that any of the rights secured by the treaty of peace are being violated by the courts in Porto Rico, this Department will, to the extent of its powers, insist upon such rights being maintained.

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The views expressed in the foregoing report were approved by Hon. Geo. D. Meiklejohn, Acting Secretary of War and communicated to the State Department as the views of the War Department. (See War Department letter to State Department of June 22, 1899.)

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**REPORT ON PROPOSED JUDICIAL ORDER BY THE MILITARY GOVERNMENT OF PORTO RICO RESPECTING "THE PAYMENT OF DEBTS CONTRACTED IN MEXICAN MONEY."**

[Submitted July 26, 1899. Case No. 826. Division of Insular Affairs, War Department.]

SIR: I have the honor to acknowledge the reference to me "for remark" of the draft of a proposed order to be enforced by the existing government in Porto Rico, as follows:

**JUDICIAL ORDER ON THE PAYMENT OF DEBTS CONTRACTED IN MEXICAN MONEY.**

SAN JUAN, P. R., *May 12, 1899.*

The honorable brigadier-general commanding the department has been pleased to issue the following order:

1. All loans and debts contracted in Mexican money where the money payable is specified as *money current* at the time the sums are refunded can be paid out in Porto Rico currency or in American money as indicated in the following articles:

2. If the payment is made in Porto Rico money 5 per cent should be discounted off the sum, the exchange of the Mexican having been made originally at this rate.

3. If the payment is made in American money, after deducting the 5 per cent difference between the Mexican and the Porto Rico money, it should be calculated at the rate of 1.66 $\frac{2}{3}$  Porto Rico to \$1 American money, which is the official rate of exchange.

This order, if made and enforced, will affect two classes of commercial contracts or paper:

1. Obligations specifying payment is to be made in money of Mexican coinage. (See indorsement by General Davis, brigadier-general commanding.)

2. Obligations specifying payment is to be made "in the money current at the time of maturity." (See indorsement by Major Sharpe, A. J. A.)

By this order the holders and owners of such commercial paper are required to discount their claims 5 per cent if payment is tendered in the present Porto Rican currency.

Under the Spanish régime in Porto Rico the currency consisted

largely of the free-coined silver of Mexico and Spain, and bank notes made legal tender by law or royal decrees. This currency constantly fluctuated in value. To guard against loss or to avoid dispute, contracts for the payment of money were drawn specifying the kind and character of the money in which the payment should be made, such as "gold of Spanish mintage," "silver of Mexican mintage," or "notes of the Spanish Bank of Porto Rico." By so doing the contracting parties ceased to consider the currency as legal tender, and elected to consider the subject of the contract as a commodity or an article of commerce, and contracted for the delivery of so many pieces of silver of such a mintage as they might have contracted for the delivery of a specified number of cocoanuts. When this fact is kept in mind it is apparent that the royal decree of December 7, 1895, by which the Mexican dollar was retired and demonitized—that is, ceased to be a legal tender—had no effect upon contracts of the character indicated. Therefore the proposed order can not be justified as carrying out the purpose of a law existing at the time of the occupation of Porto Rico, nor can said order be justified as an order of a military government maintaining a military occupation.

The contracts under consideration are between individuals and affect their private relations. As to such matters, under military occupation, the United States Supreme Court say:

By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, etc. (*Leitensdorfer v. Webb*, 20 How., 176, 177.)

Laws impairing the obligations of a contract are repugnant to the Constitution of the United States and the enlightened sentiment of the age. Military governments are to be conducted, as far as practicable, in harmony and accord with the home government or sovereignty which they represent.

To compel the discharge of contracts to pay given sums in "money current at the time the sums are refunded" upon payment of 95 per cent of the amount called for is certainly impairing the obligation of the contract.

This is not an order fixing the relative values of the various coins, notes, and tokens used as currency or mediums of exchange in Porto Rico. That service has already been performed. The purpose of this order is to adjust differences arising as to contracts between private individuals. Such action is not within the province of the executive branch of the Government.

I therefore concur in the opinion expressed in the indorsement of Maj. A. C. Sharpe, Acting Judge-Advocate, that "this appears to be

a question for the courts to determine, and it is recommended that no order be issued on the subject."

The views expressed in the foregoing report were approved by Hon. Geo. D. Meiklejohn, Acting Secretary of War and communicated to the military governor of Porto Rico as the views of the War Department. (See War Department letter to Brigadier-General Davis, dated August 5, 1899.)

**IN RE REVOCABLE LICENSE, HERETOFORE ORDERED ISSUED TO CHARLES B. GASKILL ET AL., TO CONSTRUCT AND OPERATE AN ELECTRIC RAILWAY ON CERTAIN STREETS IN THE CITY OF PONCE, P. R., AND FROM SAID CITY ACROSS THE PORTUGUESE RIVER TO PLAYA.**

[Case No. 767, Division of Insular Affairs, War Department.]

SIR: The applicants, Charles B. Gaskill *et al.*, show to this Department that they desire to construct and operate an electric railway on certain streets in the city of Ponce, P. R., and from said city across the Portuguese River to the Playa or port of said city.

To carry out said project they claim to have purchased or contracted for a right of way through private property from the city to the port. To complete said line it is necessary to cross the Portuguese River, and therefore a revocable license is desirable to permit them to bridge said stream. It is also necessary for said road, if constructed as projected, to cross a street or road known as Carretera de la Playa. This thoroughfare leads from the port of Ponce to the port at San Juan. It was constructed and maintained by Spanish national funds, and belonged to the Crown of Spain. The property right therein passed to the United States when Porto Rico was ceded, and said highway is part of the public property now owned by the United States.

A revocable license to bridge the Portuguese River should be based upon plans and specifications for the structure. This prevents misunderstanding or lack of understanding which might lead to serious loss to individual investors and also annoyance and inconvenience to the Government.

A license for an electric railway to cross so important a thoroughfare as that leading from Ponce to the port ought to specify the conditions and restrictions as to the grade of the road at the crossing, the extent of the obstruction in the street, and interference with the ordinary traffic of the street, etc., and the exercise of said license made dependent upon compliance with said conditions.

In my opinion the revocable license herein should do nothing more than—

(1) Authorize the bridging of the Portuguese River at a designated point according to plans and specifications to be approved by the Secretary of War.



(2) To cross the national highway known as Carretera de la Playa at a designated point of intersection, at a prescribed grade, and upon stated conditions.

To bridge the river and cross the highway are the only things for which a revokable license is desired by said applicants. They do not look to the United States Government for the balance of the right of way, but to the individual and municipal owners thereof.

The proposed form of license provides a grant—

to construct, operate, and maintain an electric street railway \* \* \* along and across such public thoroughfares in the city and port of Ponce, P. R., \* \* \* as may be necessary in constructing an electric railway \* \* \* as shown on the attached map, and is authorized by the mayor, council, and secretary of said city at a session held on April 28, 1899.

This provision is manifestly based upon a belief that the municipality of Ponce has granted a franchise for said electric street railway to said applicants. The showing made herein does not sustain such belief. To arrive at a proper understanding of what has been done by the municipality it is necessary to review the entire subject of municipal franchises in Porto Rico.

Under the Spanish régime the municipalities of Porto Rico had the right to grant franchises for the construction of street railways (tramways) in the streets owned and maintained by said municipalities.

Laws of Railroads for Island of Porto Rico (arts. 69, 75).

Regulations for the Exercise of said Laws (art. 104).

General Laws of Public Works of Porto Rico (arts. 6, 11).

Regulations for said Laws of Public Works (art. 91).

Municipal Laws of Porto Rico (art. 75).

See also *Leyes Civiles de España*, Madrid, 1893; *Ley Hipotecaria*, Title 1, par. 2, note 2.

This right of municipalities was not destroyed by the transfer of sovereignty.

*Cohas v. Raisin* (3 California, 443).

*Hart v. Burnett* (15 California, 530).

*Payne and Dewey v. Treadwell* (16 California, 221).

*White v. Moses* (21 California, 34).

*Merryman v. Bourne* (9 Wall., 592).

*Moore v. Steinbach* (127 U. S., 70, 81).

The treaty with Spain (Paris, 1898) provides that the property rights of municipalities are to be respected the same as are those of individuals. (Art. 8.)

The right to alienate is appurtenant to ownership, and may be exercised by municipalities during a war as in time of peace, unless forbidden by the conqueror.

Halleck's Int. Law, 3d ed., chap. 33, sec. 12.

Kent's Com. on Am. Law, vol. 1, p. 92.

The United States recognized the possession of this right by the municipalities of Porto Rico, and in order that such right might not be imprudently exercised and the property improvidently disposed of by the municipal authorities, the following order was made:

EXECUTIVE MANSION,

Washington, December 22, 1898.

Until otherwise ordered, no grants or concessions of public or corporate rights or franchises for the construction of public or quasi public works, such as railroads, tramways, telegraph and telephone lines, waterworks, gas works, electric light lines, etc., shall be made by any municipal or other local governmental authority or body in Porto Rico except upon the approval of the major-general commanding the military forces of the United States in Porto Rico, who shall, before approving any such grant or concession, be so especially authorized by the Secretary of War.

WILLIAM MCKINLEY.

This order is dated December 22, 1898. The proceedings taken herein by the municipal authorities of Ponce were had on April 28, 1899. It does not appear that the permission required by said order has yet been secured in the proceedings invoked hereon. A strict construction of this order would require the authorization of the Secretary of War as a condition precedent to the action of the municipal authorities, or at least the approval of the major-general commanding. But I have no doubt the requirements of the order may be waived and the proceedings made valid by the Secretary of War. If this is done, it should be accomplished by the indorsement of the Secretary of War on the papers, showing the action of the municipal authorities and the approval thereof by the major-general commanding. Said indorsement should be one of approval and ratification. This would probably be the inevitable intendment of the revocable license herein. That instrument, as now prepared, in dealing with this branch of the matter involved, does not go far enough in one direction and goes too far in another.

If the municipality of San Juan has lawfully granted the use of certain of its streets to these applicants for the purposes of a street railway, such action was taken pursuant to a right of the municipality as proprietor of the streets. The *privilege of exercising* this right, at this time, is secured from the Secretary of War, but not the *right* itself. The right was conferred by the Spanish law and continues under the American occupation. If the municipality has granted a franchise to these applicants, then the rights thereby conveyed are vested rights. They are rights lawfully conveyed by a grantor competent to convey to a grantee competent to receive. The terms and conditions of the transfer have been fixed by the parties to the transaction.

The proposed revocable license changes the terms and conditions agreed upon by the parties, and provides that the exercise of the rights under an alleged franchise "to construct, operate, and maintain

an electric street railway \* \* \* along and across such public thoroughfares in the city and port of Ponce, Porto Rico, \* \* \* as may be necessary \* \* \* and as authorized by the mayor, council, and secretary of said city at a session held on April 28, 1899," shall be "revocable at will by the Secretary of War."

The Secretary of War is not authorized to exercise such power over the contracts of municipalities in Porto Rico. He may require the municipality to insert such provision in its contract or conveyance as a condition upon which he will allow it to exercise its right to contract or convey, but the limitation must be the act of the contracting parties.

The revocable license should deal only with the use of property belonging to the United States and in the custody of the War Department. It has nothing to do with the use of property belonging to the municipality of Ponce. Said license should be confined to the two pieces of government property involved, to wit, the location of a bridge across the Portuguese River and the crossing of the national highway.

I am of the opinion that the applicants herein have not secured a franchise for said street railway from the municipality of Ponce; nor have they been authorized to construct, operate, and maintain said railway by the action of the mayor, council, and secretary of said city on April 28, 1899.

It will be assumed, without further discussion, that by the laws of Spain the municipality of Ponce owned the fee of certain streets on which it is proposed to construct this street railway and possessed the right of alienating the same. That upon Porto Rico being subjected to military government and thereafter ceded to the United States, the property rights of the municipality (including that of alienation) in and to said streets were not lost or changed, except as their exercise was restrained by the Executive order of December 22, 1898. Assuming the requirements of said order complied with and the municipality authorized to exercise the right of alienation, the question arises as to what procedure is to be followed. To answer this question is to solve the problem of municipal franchises in Porto Rico under the provisional government now being maintained there by the United States.

The municipality must act by and through its officers or agents. These officers are not authorized to dispose of the property of the municipality as though it belonged to them personally. They can dispose of said property only when authorized so to do by an existing law, and if the law prescribes a method for the exercise of such authority that method must be pursued.

Since the lawmaking branch of the United States Government has not acted upon this matter, it follows that such laws, if existing, must be the Spanish laws in force at the date of the cession.

The proceedings required for granting franchises by municipalities

under the Spanish laws of Porto Rico are (in general) as follows: The promoter presents a general project. If approved by the municipal council, he prepares detailed plans and specifications. These being approved, their commercial value in price is fixed by appraisement. Advertisement is made that a franchise for the execution of said plan will be sold to the best bidder, bids to be received at a given time and place. Bids must be in writing and accompanied by 1 per cent of the estimated cost of the project. The original promoter has the privilege of being substituted for the best bidder. If he declines to be substituted, the original bidder must pay him the appraised value of the plans and specifications. The successful bidder then deposits 3 per cent of the estimated cost of the project as a guaranty of good faith and the franchise is granted.

(See Spanish Laws, cited, *ante.*)

Under the proceedings set forth herein, the applicants have secured an approval of their project by the municipal authorities of Ponce. Under the opinion of the Attorney-General as to tramway concessions, Ponce, P. R., delivered to the Secretary of War July 28, 1899, upon the claim of Messrs. Vicente and José Usera to such franchise, such approved plan does not constitute a franchise.

The most the Secretary of War can do is to authorize the municipality to proceed in the granting of this application and exercise the rights conferred by the Spanish law.

A municipal franchise permitting the use of the streets for particular purposes does not ordinarily convey title, but simply permits use in a prescribed manner for a desired object. Under the Spanish law above quoted the municipalities of Porto Rico are authorized to grant such permits.

The Spanish laws in force in Porto Rico do not contemplate the granting of municipal franchises which are exclusive or perpetual. With the exception of the authority exercised by the officers of the Crown, said laws are in harmony with the political institutions of the United States. Relieved from the controlling influence of the Crown officials, they furnish an excellent means and method of disposing of municipal franchises and regulation thereof.

In connection with this report, I direct attention to a discussion of the subject of municipal franchises in Porto Rico, recently prepared and submitted by me.

I also consider it not improper to direct attention to the fact that the franchise for a railway connecting the city of Ponce with the port is considered the most valuable franchise in Porto Rico, and there are on file in this department a number of applications for it, and many letters and personal inquiries received in relation thereto. There is also one company claiming to own a franchise for said railway. The key to the situation is the right to occupy streets in the city of Ponce. I am not advised that any reason exists for conferring this privilege

upon Gaskell to the exclusion of the other applicants, although it is but just to Mr. Gaskell to state that he is the only applicant whose plan, as now presented, contemplates securing a right of way through private property, between the city and the port, instead of occupying the national highway.

If the method prescribed by the Spanish law is followed the difficulty is obviated. That law requires the franchise to be disposed of by public bidding after due notice by publication. This would afford all parties interested an equal opportunity to accomplish their desires.

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[Senate Doc. No. 173, Fifty-seventh Congress, first session. By Senate resolution of March 5, 1902, 6,000 additional copies were ordered printed.]

**COMMUNICATION FROM THE LAW OFFICER OF THE DIVISION  
OF INSULAR AFFAIRS, MAKING A COMPARISON BETWEEN THE  
EXISTING LAWS OF THE UNITED STATES AGAINST TREASON,  
SEDITION, AND MISPRISION AND THE PROVISIONS OF ACT  
NO. 292 OF THE PHILIPPINE COMMISSION.**

WAR DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., February 10, 1902.*

MY DEAR SENATOR: I have the honor to acknowledge the receipt of your request that I make a comparison between the existing laws of the United States against treason, sedition, and misprision and the provisions of act No. 292 of the Philippine Commission, entitled "An act defining the crimes of treason, insurrection, sedition, conspiracies to commit such crimes, seditious utterances, whether written or spoken, the formation of secret political societies, the administering or taking of oaths to commit crimes or to prevent the discovering of the same, and the violation of oaths of allegiance, and prescribing punishment therefor."

In compliance with your request, I have the further honor to transmit a copy of said act No. 292, together with the suggested comparison.

Very respectfully,

CHARLES E. MAGOON,  
*Law Officer Division of Insular Affairs.*

Hon. J. B. FORAKER,  
*United States Senate.*

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[No. 292.]

AN ACT defining the crimes of treason, insurrection, sedition, conspiracies to commit such crimes, seditious utterances, whether written or spoken, the formation of secret political societies, the administering or taking of oaths to commit crimes or to prevent the discovering of the same, and the violation of oaths of allegiance, and prescribing punishment therefor.

*By authority of the President of the United States, be it enacted by the United States Philippine Commission, that:*

SECTION 1. Every person resident in the Philippine Islands owing allegiance to the United States or the government of the Philippine Islands who levies war against

them, or adheres to their enemies, giving them aid and comfort within the Philippine Islands or elsewhere, is guilty of treason, and, upon conviction, shall suffer death, or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years and fined not less than ten thousand dollars.

SEC. 2. Every person owing allegiance to the United States or the government of the Philippine Islands, and having knowledge of any treason against them or either of them, who conceals, and does not, as soon as may be, disclose and make known the same to the provincial governor in the province in which he resides, or to the civil governor of the islands, or to some judge of a court of record, is guilty of misprision of treason, and shall be imprisoned not more than seven years and be fined not more than one thousand dollars.

SEC. 3. Every person who cites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or of the government of the Philippine Islands, or the laws thereof, or who gives aid or comfort to anyone so engaging in such rebellion or insurrection, shall, upon conviction, be imprisoned for not more than ten years and be fined not more than ten thousand dollars.

SEC. 4. If two or more persons conspire to overthrow, put down, or destroy by force the Government of the United States in the Philippine Islands or the government of the Philippine Islands, or by force to prevent, hinder, or delay the execution of any law of the United States or of the Philippine Islands, or by force to seize, take, or possess any property of the United States or of the government of the Philippine Islands, contrary to the authority thereof, each of such persons shall be punished by a fine of not more than five thousand dollars and by imprisonment, with or without hard labor, for a period not more than six years.

SEC. 5. All persons who rise publicly and tumultuously in order to attain by force or outside of legal methods any of the following objects are guilty of sedition:

1. To prevent the promulgation or execution of any law or the free holding of any popular election.

2. To prevent the insular government or any provincial or municipal government or any public official from freely exercising its or his duties or the due execution of any judicial or administrative order.

3. To inflict any act of hate or revenge upon the person or property of any official or agent of the insular government or of a provincial or municipal government.

4. To inflict, with a political or social object, any act of hate or revenge upon individuals or upon any class of individuals in the islands.

5. To despoil, with a political or social object, any class of persons, natural or artificial, a municipality, a province, or the insular government or the Government of the United States, of any part of its property.

SEC. 6. Any person guilty of sedition as defined in section 5 hereof shall be punished by a fine of not exceeding five thousand dollars and by imprisonment not exceeding ten years, or both.

SEC. 7. All persons conspiring to commit the crime of sedition shall be punished by a fine of not exceeding one thousand dollars or by imprisonment not exceeding five years, or both.

SEC. 8. Every person who shall utter seditious words or speeches, write, publish, or circulate scurrilous libels against the Government of the United States or the insular government of the Philippine Islands or which tend to disturb or obstruct any lawful officer in executing his office, or which tend to instigate others to cabal or meet together for unlawful purposes, or which suggest or incite rebellious conspiracies or riots, or which tend to stir up the people against the lawful authorities or to disturb the peace of the community, the safety and order of the Government, or who shall knowingly conceal such evil practices, shall be punished by a fine not exceeding two thousand dollars or by imprisonment not exceeding two years, or both, in the discretion of the court.

SEC. 9. All persons who shall meet together for the purpose of forming, or who shall form, any secret society, or who shall after the passage of this act continue membership in a society already formed having for its object, in whole or in part, the promotion of treason, rebellion, or sedition, or the promulgation of any political opinion or policy, shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both.

SEC. 10. Until it has been officially proclaimed that a state of war or insurrection against the authority or sovereignty of the United States no longer exists in the Philippine Islands it shall be unlawful for any person to advocate orally, or by writing or printing or like methods, the independence of the Philippine Islands or their separation from the United States, whether by peaceable or forcible means, or to print, publish, or circulate any handbill, newspaper, or other publication advocating such independence or separation.

Any person violating the provisions of this section shall be punished by a fine of not exceeding two thousand dollars and imprisonment not exceeding one year.

SEC. 11. Every person who shall administer, or be present and consent to the administering of, any oath or any engagement purporting to bind the person taking the same to commit any crime punishable by death or by imprisonment for five years or more, or who shall attempt to induce or compel any person to take any such oath or engagement or who shall himself take any such oath or engagement, shall be punished by a fine not exceeding two thousand dollars or by imprisonment not exceeding ten years.

SEC. 12. Any person who administers or who is present at and consenting to the administering of any oath or engagement purporting to bind the person taking the same, either—

1. To engage in any seditious purpose; or
2. To disturb the public peace or commit or endeavor to commit any criminal offense; or
3. To fail or refuse to inform and give evidence against any associate, confederate, or other person; or
4. To fail or refuse to reveal or discover any unlawful combination or confederacy or any illegal act done or to be done or any illegal oath or obligation or engagement which may have been administered or tendered to, or taken by, any person or the import of any such oath, obligation, or engagement;

And likewise anyone who attempts to induce or compel any person to take any such oath or engagement, and likewise any person who takes any such oath or engagement, shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding five years, or both.

SEC. 13. Any person who under such compulsion as would otherwise excuse him offends against either of the last two preceding sections shall not be excused thereby unless within the periods hereinafter stated he declares the same, and what he knows touching the same, and the persons by whom such oath or obligation or engagement was administered or taken, by information upon oath before a justice of the peace, judge of a court of first instance, or provincial fiscal of the municipality or province in which such oath or engagement was administered or taken. Such declaration may be made by him within fourteen days after the commission of the offense, or, if he is hindered from making it by actual force or sickness, then within eight days after cessation of such hindrance, or on his trial, if that happens before the expiration of either of those periods.

SEC. 14. Any person who shall have taken any oath before any military officer of the Army of the United States or before any officer under the civil government of the Philippine Islands, whether such official so administering the oath was specially authorized by law so to do or not, in which oath the affiant in substance engaged to recognize or accept the supreme authority of the United States of America in these

islands, or to maintain true faith or allegiance thereto, or to obey the laws, legal orders, and decrees promulgated by its duly constituted authorities, and who shall, after the passage of this act, violate the terms and provisions of such oath or any of such terms or provisions, shall be punished by a fine not exceeding two thousand dollars or by imprisonment not exceeding ten years, or both.

SEC. 15. The provisions of this act shall not apply to the organized provinces of Batangas, Cebú, and Bohol, nor to any province where civil government has not been established, so long as insurrection against the authority of the United States exists therein, unless the Commanding General of the Army of the United States, Division of the Philippines, shall authorize and direct prosecutions in the civil courts in such territories for offenses under this act, in which event it shall apply.

SEC. 16. All laws and parts of laws now in force, so far as the same may be in conflict herewith, are hereby repealed; provided, that nothing herein contained shall operate as a repeal of existing laws in so far as they are applicable to pending actions or existing causes of actions, but as to such causes of actions, or pending actions, existing laws shall remain in full force and effect, this act being entirely prospective.

SEC. 17. A foreigner, residing in the Philippine Islands, who shall commit any of the crimes specified in the preceding sections of this act, except those specified in sections 1 and 2, shall be punished in the same way and with the same penalty as that prescribed for the particular crime therein.

SEC. 18. This act shall take effect on its passage.

Enacted November 4, 1901.

[War Department, office of the Secretary, Division of Insular Affairs. Report on act 292, Philippine Commission, entitled "An act defining the crimes of treason, insurrection, sedition, conspiracies to commit such crimes, seditious utterances, whether written or spoken, the formation of secret political societies, the administering or taking of oaths to commit crimes or to prevent the discovering of the same, and the violation of oaths of allegiance, and prescribing punishment therefor. Submitted by Charles E. Magoon, law officer, Division of Insular Affairs, War Department.]

COMPARISON OF THE PROVISIONS OF ACT NO. 292 OF PHILIPPINE COMMISSION, ENTITLED "AN ACT DEFINING THE CRIMES OF TREASON, INSURRECTION, SEDITION, CONSPIRACIES TO COMMIT SUCH CRIMES, SEDITIOUS UTTERANCES, WHETHER WRITTEN OR SPOKEN, THE FORMATION OF SECRET POLITICAL SOCIETIES, THE ADMINISTERING OR TAKING OF OATHS TO COMMIT CRIMES OR TO PREVENT THE DISCOVERING OF THE SAME, AND THE VIOLATION OF OATHS OF ALLEGIANCE, AND PRESCRIBING PUNISHMENT THEREFOR," WITH SIMILAR STATUTES ENACTED IN THE UNITED STATES.

*Act No. 292, Philippine Commission.*

SECTION 1. Every person, resident in the Philippine Islands, owing allegiance to the United States or the government of the Philippine Islands, who levies war against them, or adheres to their enemies, giving them aid and comfort, within the Philippine Islands or elsewhere, is guilty of treason, and, upon conviction, shall suffer death, or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years and fined not less than ten thousand dollars.

*Laws of the United States (Rev. Stat. of United States.*

SEC. 5331. Every person owing allegiance to the United States who levies war against them, or adheres to their enemies, giving them aid and comfort, within the United States or elsewhere, is guilty of treason.

SEC. 5332. Every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be levied and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or con-



SEC. 2. Every person, owing allegiance to the United States or the government of the Philippine Islands and having knowledge of any treason against them or either of them, who conceals, and does not, as soon as may be, disclose and make known the same to the provincial governor in the province in which he resides, or to the civil governor of the islands, or to some judge of a court of record, is guilty of misprision of treason, and shall be imprisoned not more than seven years and be fined not more than one thousand dollars.

SEC. 3. Every person who incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or of the government of the Philippine Islands, or the laws thereof, or who gives aid or comfort to anyone so engaging in such rebellion or insurrection, shall, upon conviction, be imprisoned for not more than ten years and be fined not more than ten thousand dollars.

SEC. 4. If two or more persons conspire to overthrow, put down, or destroy by force the Government of the United States in the Philippine Islands, or the government of the Philippine Islands, or by force to prevent, hinder, or delay the execution of any law of the United States or of the Philippine Islands, or by force to seize, take, or possess any property of the United States or of the government of the Philippine Islands contrary to the authority thereof, each of such persons shall be punished by a fine of not more than five thousand dollars, and by imprisonment, with or without hard labor, for a period not more than six years.

SEC. 5. All persons who rise publicly and tumultuously in order to attain by force or outside of legal methods any of the following objects, are guilty of sedition:

veyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States.

SEC. 5333. Every person, owing allegiance to the United States and having knowledge of the commission of any treason against them, who conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason, and shall be imprisoned not more than seven years and fined not more than one thousand dollars.

SEC. 5334. Every person who incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States, or the laws thereof, or gives aid or comfort thereto, shall be punished by imprisonment not more than ten years, or by a fine of not more than ten thousand dollars, or by both of such punishments; and shall, moreover, be incapable of holding any office under the United States.

SEC. 5336. If two or more persons in any State or Territory conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States contrary to the authority thereof; each of them shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars; or by imprisonment, with or without hard labor, for a period not less than six months nor more than six years, or by both such fine and imprisonment.

SEC. 5506. Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any

PAR. 1. To prevent the promulgation or execution of any law or the free holding of any popular election.

PAR. 2. To prevent the insular government, or any provincial or municipal government, or any public official from freely exercising its or his duties or the due execution of any judicial or administrative order.

PAR. 3. To inflict any act of hate or revenge upon the person or property of any official or agent of the insular government or of a provincial or municipal government.

election in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment.

SEC. 5398. Every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer or other person duly authorized in serving or executing any writ, rule, order, process, or warrant shall be imprisoned not more than twelve months and fined not more than three hundred dollars.

SEC. 5399. Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness or officer in any court of the United States in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both.

SEC. 5407. If two or more persons in any State or Territory conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

SEC. 5518. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under

the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

PAR. 4. To inflict, with a political or social object, any act of hate or revenge upon individuals or upon any class of individuals in the islands.

PAR. 5. To despoil, with a political or social object, any class of persons, natural or artificial, a municipality, a province, or the insular government or the Government of the United States, or any part of its property.

SEC. 6. Any person guilty of sedition as defined in section 5 hereof shall be punished by a fine of not exceeding five thousand dollars and by imprisonment not exceeding ten years, or both.

SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

(Sections 5 and 6 of the act of the Philippine Commission No. 292 are reenactments, with modified penalties, of articles 236 and 237 of the reform penal code of Spain, in force in the Philippines at the time of the transfer of sovereignty. Said articles of the Spanish code are as follows:

"ART. 236. Those who shall rise publicly and tumultuously in order to attain by force or outside of legal methods any of the following objects are guilty of sedition:

"1. To prevent the promulgation or execution of laws, or the free holding of popular elections in any province, circumscription, or electoral district.

"2. To prevent any authority, corporation, official, or public officer from freely exercising his duties or the execution of his official or administrative orders.

"3. To wreak any deed of hate or revenge upon the person or property of any authority or its agents.

"4. To wreak, with a political or social object, any deed of hate or revenge upon individuals or upon any class in the State.

"5. To despoil, with a political or social object, any class of persons, the municipality, the province, of the State of all or any part of their property, or to lay waste or destroy such property.

"ART. 237. Those who, by inciting the seditious and making them resolute, shall have promoted and supported sedition, and its principal leaders, shall be punished with the penalty of *reclusión temporal* should they be included in any of the cases specified in the first paragraph of No. 2 of article 174, and with that of *prisión mayor* should they not be included in any of these."

(See Trans. Penal Code for the Philippines, Div. of Ins. Affrs., War Dept.)

SEC. 7. All persons conspiring to commit the crime of sedition shall be punished by a fine of not exceeding one thousand dollars, or by imprisonment not exceeding five years, or both.

SEC. 5337. Every person who recruits soldiers or sailors within the United States to engage in armed hostility against the same, or who opens within the United States a recruiting station for the enlistment of such soldiers or sailors to serve in any manner in armed hostility against the United States, shall be fined not less than two hundred dollars nor more than one thousand dollars, and imprisoned not less than one year nor more than five years.

SEC. 5338. Every soldier or sailor enlisted or engaged within the United States with intent to serve in armed hostility against the same, shall be punished by a fine of one hundred dollars, and by imprisonment not less than one year nor more than three years.

SEC. 1342, Art. 19, p. 232, U. S. Rev. Stats. Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.

SEC. 1342, Art. 22. Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.

SEC. 1342, Art. 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

SEC. 1624, Art. 8, provides: "Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy who \* \* \* utters any seditious or mutinous words."

*Act No. 292 Philippine Commission.*

SEC. 8. Every person who shall utter seditious words or speeches, write, publish, or circulate scurrilous libels against the Government of the United States or the insular government of the Philippine Islands, or which tend to disturb or obstruct any lawful officer in executing his office, or which tend to instigate others to cabal or meet together for unlawful purposes, or which suggest or incite rebellious conspiracies or riots, or which tend to stir up the people against the lawful author-

*Code of Tennessee.*

SEC. 5555. Whoever shall be guilty of uttering seditious words or speeches, spreading abroad false news, writing or dispersing scurrilous libels against the State or General Government, disturbing or obstructing any lawful officer in executing his office, or of instigating others to cabal and meet together, to contrive, invent, suggest, or incite rebellious conspiracies, riots, or any manner of unlawful feud or differences, thereby to stir people up maliciously to contrive the ruin

ities or to disturb the peace of the community, the safety and order of the Government, or who shall knowingly conceal such evil practices, shall be punished by a fine not exceeding two thousand dollars or by imprisonment not exceeding two years, or both in the discretion of the court.

(This section was probably drafted by Hon. Luke E. Wright, acting governor of the Philippines, who formerly practiced law in Tennessee. Being familiar with the statutes of that State, he naturally adopted the language employed by the Tennessee legislature in creating an enactment of similar character.)

and destruction of the peace, safety, and order of the Government, or shall knowingly conceal such evil practices, shall be punished by fine and imprisonment at the discretion of the court and jury trying the case, and may be compelled to give good and sufficient sureties for his or her good behavior during the court's pleasure, and shall be incapable of bearing any office of honor, trust, or profit in the State government for the space of three years. It shall be the duty of the judge to give this in charge to the grand jury, and no prosecutor shall be required to an indictment under this article.

(See sec. 5555, Code of Tennessee, Miliken & Vertrees, 1884.)

*Revised Statutes of the United States.*

SEC. 2111. Every person who sends any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or law of the United States, or to disturb the peace and tranquillity of the United States, is liable to a penalty of two thousand dollars.

SEC. 2112. Every person who carries or delivers any talk, message, speech, or letter, intended to produce a contravention or infraction of any treaty or law of the United States, or to disturb the peace or tranquillity of the United States, knowing the contents thereof, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or State is liable to a penalty of one thousand dollars.

SEC. 2113. Every person who carries on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or who alienates, or attempts to alienate, the confidence of any Indian or Indians from the Government of the United States, is liable to a penalty of one thousand dollars.

*Revised Statutes of Florida.*

2376. Exciting insurrection. If any person shall excite an insurrection or sedition amongst any portion or class of the population of this State, or shall attempt by writing, speaking, or by any other means to excite such insurrection or sedition, the person or persons so offending shall be punished by imprisonment in the State prison not exceeding twenty years.

*Penal Code of West Virginia. (Chapter CXLIII.)*

SEC. 4. If any person shall attempt to justify or uphold an armed invasion of this State, or an organized insurrection therein, by speaking, writing, or printing, or by publishing or circulating any written or printed document, or in any other way whatever, during the continuance of such invasion or insurrection, he shall be fined not exceeding one thousand dollars and be confined in jail not exceeding twelve months.

*Act No. 292, Philippine Commission.*

SEC. 9. All persons who shall meet together for the purpose of forming or who shall form any secret society, or who shall after the passage of this act continue membership in a society already formed, having for its object, in whole or in part, the promotion of treason, rebellion, or sedition, or the promulgation of any political opinion or policy shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both.

*Laws of Maryland.*

SEC. 267. If any person or persons within this State shall hold any secret or public meeting or unite with or belong to any secret club or association known by him or them to be intended to effect, promote, or encourage the separation or secession of this State from the Government or Union of the United States, every such person, upon conviction thereof, shall be sentenced to confinement in the penitentiary for a term not less than two nor more than six years, or to a fine of not less than five hundred or more than three thousand dollars, at the discretion of the court.

*Gen. Stats. of Kansas. (Chap. 100, crimes, &c.)*

SEC. 3. Any citizen of this State who shall join any society or organization the object of which shall be to produce an insurrection or to revolutionize the government of this State or of the United States, or shall furnish arms or military

stores to the enemies of this State or of the United States, knowing them to be such, shall, upon conviction, be punished by confinement in the penitentiary for not less than one nor more than ten years.

*Revised Stats. of Florida.*

SEC. 2374. Combination to usurp government: If two or more persons shall combine by force to usurp the government of this State, or to overturn the same, or interfere forcibly in the administration of the government or any department thereof, the person so offending shall be punished by imprisonment in the State prison not exceeding ten years.

*Decision of the United States Supreme Court.*

The Supreme Court of the United States say:

"Open resistance to the measures deemed necessary to subdue a great rebellion by those who enjoy the protection of government and have not the excuse even of prejudice of section to plead in their favor becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war and thus overthrow the power of the United States. Conspiracies like these at such a juncture are extremely perilous, and those concerned in them are dangerous enemies to their country and should receive the heaviest penalties of the law as an example to deter others from similar criminal conduct." (Ex parte Milligan, 4 Wall., 130.)

*Act No. 292, Philippine Commission.*

SEC. 10. Until it has been officially proclaimed that a state of war or insurrection against the authority or sovereignty of the United States no longer exists in the Philippine Islands, it shall be unlawful for any person to advocate, orally or by writing or printing or like methods, the independence of the Philippine Islands or

*Rev. Stats. of the United States.*

SEC. 5335. Every citizen of the United States, whether actually resident or abiding within the same or in any foreign country, who, without the permission or authority of the Government, directly or indirectly commences or carries on any verbal or written correspondence or intercourse with any foreign government,



their separation from the United States, whether by peaceable or forcible means, or to print, publish, or circulate any handbill, newspaper, or other publication advocating such independence or separation.

Any person violating the provisions of this section shall be punished by a fine of not exceeding two thousand dollars and imprisonment not exceeding one year.

or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States, and not duly authorized, who counsels, advises, or assists in any such correspondence with such intent shall be punished by a fine of not more than five thousand dollars and by imprisonment during a term not less than six months nor more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

*Laws of Maryland.*

SEC. 267. If any person or persons within this State shall hold any secret or public meeting, or unite with or belong to any secret club or association known by him or them to be intended to effect, *promote, or encourage the separation or secession of this State from the Government or Union of the United States*, every such person, upon conviction thereof, shall be sentenced to confinement in the penitentiary for a term not less than two nor more than six years, or to a fine of not less than five hundred or more than three thousand dollars, at the discretion of the court.

*Statutes of New Jersey (chapter on crimes).*

SEC. 4. If any person owing allegiance to this State shall, by speech, writing, open deed or act, advisedly and wittingly maintain and defend the authority or jurisdiction of any foreign power, potentate, republic, king, state, or nation whatsoever in and over this State, or the people thereof, such person so offending shall, on conviction, be punished by fine or imprisonment, or both, or by fine or imprisonment at hard labor, or both, the fine not to exceed four hundred dollars nor the imprisonment the term of one year.

*Penal code of Virginia.*

SEC. 3658. Treason shall consist only in levying war against the State, or adhering to its enemies, giving them aid and comfort, or establishing, without authority of the legislature, any government within its limits separate from the existing government, or holding or executing in such usurped government any office, or professing allegiance or fidelity to it, or resisting the execution of the laws under color of its authority; and such treason, if proved by the testimony of two witnesses to the same overt act or by confession in court, shall be punished with death.

\* \* \* \*

SEC. 3660. If any person attempt to establish any such usurped government and commit any overt act therefor, or by writing or speaking endeavor to instigate others to establish such government, he shall be confined in jail not exceeding twelve months and fined not exceeding one thousand dollars.

See Laws of Rhode Island, chap. 30, sections 4-7. (Post p. 683.)

*Decision of the United States Supreme Court.*

Respecting the title to sovereignty and property acquired by the United States in the Philippines the Supreme Court say (see the Diamond Ring case, opinion filed Dec. 2, 1901):

"It is further contended that a distinction exists in that, while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

"We must decline to assume that the Government wishes thus to disparage the title of the United States or to place itself in the position of waging a war of conquest.

• "The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her or that uncivilized tribes may have defied her will did not affect the validity of her title. She granted the islands to the United States,

and the grantee in accepting them took nothing less than the whole grant.

"If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected.

"We do not understand that it is claimed that in carrying on the pending hostilities the Government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this can not be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable."

*Act No. 292, Philippine Commission.*

SEC. 11. Every person who shall administer, or be present and consent to the administering of, any oath or any engagement purporting to bind the person taking the same to commit any crime punishable by death or by imprisonment for five years or more, or who shall attempt to induce or compel any person to take any such oath or engagement, or who shall himself take any such oath or engagement, shall be punished by a fine not exceeding two thousand dollars or by imprisonment not exceeding ten years.

SEC. 12. Any person who administers or who is present at, and consenting to, the administering of any oath or engagement purporting to bind the person taking the same, either:

1. To engage in any seditious purpose;  
or

*Revised Statutes of United States.*

SEC. 5308. Whenever during any insurrection against the Government of the United States, after the President shall have declared by proclamation that the laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person, or his agent, attorney, or employee, purchases or acquires, sells or gives, any property of whatsoever kind or description with intent to use or employ the same, or suffers the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein, or being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawful subject of prize and capture wherever found; and it shall be the duty of the President to cause the same to be seized, confiscated, and condemned.

SEC. 5440. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy

2. To disturb the public peace or commit or endeavor to commit any criminal offense; or

3. To fail or refuse to inform and give evidence against any associate, confederate, or other person; or

4. To fail or refuse to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done, or any illegal oath or obligation or engagement which may have been administered or tendered to or taken by any person, or the import of any such oath, obligation, or engagement.

And likewise anyone who attempts to induce or compel any person to take any such oath or engagement, and likewise any person who takes any such oath or engagement, shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding five years, or both.

shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars and to imprisonment not more than two years.

(United States Digest, vol. 3, p. 353.)

A conspiracy is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.

*State v. Mayberry*, 48 Me., 218; *State v. Rowley*, 12 Conn., 101; *Smith v. People*, 25 Ill., 17; *Commonwealth v. Hunt*, 4 Metc. (Mass.), 111; *Alderman v. People*, 4 Mich., 414; *State v. Burnham*, 15 N. H., 396; *Hinchman v. Richie*, Bright (Pa.), 143.

The gist of a conspiracy is the unlawful confederacy to do an unlawful act or a lawful act for an unlawful purpose. And the offense is complete when the confederacy is made.

(*Commonwealth v. Judd*, 2 Mass., 337; *Commonwealth v. Tibbets*, 2 Mass., 538; *Commonwealth v. Warren*, 6 Mass., 74; *People v. Mather*, 4 Wend. (N. Y.), 259; *State v. Cawood*, 2 Stew. (Ala.), 360; *State v. Rickey*, 9 N. J. L. (4 Hals.), 293; *State v. Buchanan*, 5 Har. & J. (Md.), 317; *Collins v. Commonwealth*, 3 Serg. & R. (Pa.), 220. See also *Republica v. Koss*, 2 Yeates (Pa.), 8; *Morgan v. Bliss*, 2 Mass., 112; *Commonwealth v. Hunt*, Thach. (Mass.), Cr. Cas., 609; *People v. Richards*, 1 Mich., 216.)

A conspiracy is criminal when the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates. *Chew v. Carlisle*, Bright (Pa.), 36.

The provisions of the remaining sections of said act No. 292 (13-18) are not considered as requiring comparison.

## LAWS OF THE STATES OF THE UNION AGAINST TREASON AND MISPRISION OF TREASON.

In many of the statutes hereinafter set forth the words "levying of war" are used to describe and define the crime of treason. That an accurate understanding may be had of what is meant by the expression "levying of war," the following is quoted from Bouvier's Law Dictionary, edition of 1897. (See title, Treason.)

"To constitute a 'levying of war' there must be an assemblage of persons with force and arms to overthrow the government or resist the laws. All who aid in the furtherance of the common object of levying war against the United States, in however minute a degree or however remote from the scene of action, are guilty of treason." (4 Sawy., 457.)

In *ex parte Bollman et al.* (4 Cranch., 75), Chief Justice Marshall said (126):

"It is not the intention of the court to say that no individual can be guilty of this crime (treason) who has not appeared in arms against his country. On the contrary, if war be actually levied—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." (See also *Druecker v. Salomon*, 21 Wis., 621.)

### CODE OF ALABAMA (1896).

#### TREASON.

##### PROVISIONS OF THE CONSTITUTION.

§ 19. That treason against the State shall consist only in levying war against it or adhering to its enemies, giving them aid and comfort; and that no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or his own confession in open court.

##### STATUTORY PROVISIONS.

5605. *Punishment of treason.* Everyone who commits the crime of treason against the State must, on conviction, suffer death or imprisonment in the penitentiary for life, at the discretion of the jury trying the same.

### REVISED STATUTES OF ARIZONA.

#### TITLE III.—OFFENSES AGAINST THE SOVEREIGNTY OF THE TERRITORY.

30. Whoever unlawfully levies war against this Territory or the United States, or the inhabitants of either, or knowingly adheres to the enemies of either, giving them aid or comfort, is guilty of treason against the Territory of Arizona.

31. Any persons, including Indians, who reside within the Territory are capable of committing treason, and allegiance to the Territory shall be conclusively presumed from a residence therein upon a trial for treason.

32. Levying war against this Territory or the United States, or the inhabitants of either, may consist of inciting, setting on foot, assisting or engaging in any rebellion, Indian outbreak or insurrection against the authority of the Territory or of the United States, or against the authority of the laws of either.

33. The punishment of treason shall be death.

34. Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. It is punishable by imprisonment in the Territorial prison for a term not exceeding five years.

## STATUTES OF ARKANSAS.

[Sandels &amp; Hill, 1894.]

## TREASON.

## CRIMINAL LAW.

SECTION 1912. Treason against the State shall consist only in levying war against the State or adhering to its enemies, giving aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or his own confession in open court.

SEC. 1913. Any person convicted of treason shall suffer death.

SEC. 1914. Misprision of treason shall consist in the knowledge and concealment of treason actually committed by others, without otherwise assenting to or participating in the crime.

SEC. 1915. Any person duly convicted of misprision of treason shall be punished by fine not exceeding one thousand dollars and imprisonment not exceeding one year.

## PENAL CODE OF CALIFORNIA.

## OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SECTION 37. Treason against this State consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the State. The punishment of treason shall be death.

SECTION 38. Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. It is punishable by imprisonment in the State prison for a term not exceeding five years.

## GENERAL STATUTES OF CONNECTICUT (1888).

## OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SECTION 1396. Every person who shall commit treason against this State, by levying war against it or by adhering to its enemies, giving them aid and comfort, shall suffer death.

SECTION 1397. Every person who shall endeavor to join the enemies of this State, or use his influence to induce any person to join, aid, or comfort them, or shall know of any person endeavoring or using such influence, or of any treason described in the preceding section, and shall conceal the same, shall be fined not more than one thousand dollars, and imprisoned in the State prison not less than three nor more than seven years.

SECTION 1398. Every person in this State who shall, in time of war or of rebellion against this State or the United States, directly or indirectly, commence or carry on any intercourse with any enemy or rebel, or with any person, for the purpose of being communicated to him, with intent to aid him or to defeat or embarrass the measures of the Government of this State or of the United States; or shall, directly or indirectly, sell or transport, or attempt to transport, to such enemy or rebels arms, munitions of war, or provisions or supplies of any kind, shall be fined not more than one thousand dollars, or imprisoned in the State prison not less than three nor more than seven years, or both.

## REVISED CODE OF DELAWARE (1893).

## OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SECTION 1. Every person who shall commit treason against the State shall be deemed guilty of felony, and shall suffer death.

## REVISED STATUTES OF FLORIDA (1892).

## CRIMES AND CRIMINAL PROCEDURE.

## OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

2372. *Treason*.—Treason against the State shall consist only in levying war against the same, or in adhering to the enemies thereof, or giving them aid and comfort. Whoever commits treason against this State shall be punished by imprisonment in the State prison for life at hard labor.

2373. *Misprision of treason*.—Whoever having knowledge of the commission of treason conceals the same and does not as soon as may be disclose and make known such treason to the governor or one of the justices of the supreme court or a judge of the circuit court, shall be judged guilty of the offense of misprision of treason and be punished by imprisonment in the State prison not exceeding five years or by fine not exceeding one thousand dollars.

2374. *Combination to usurp government*.—If two or more persons shall combine by force to usurp the government of this State, or to overturn the same, or interfere forcibly in the administration of the government, or any department thereof, the person so offending shall be punished by imprisonment in the State prison not exceeding ten years.

2375. *Combination against part of the people of the State*.—If two or more persons shall combine to levy war against any part of the people of this State, or to remove them forcibly out of this State, or to remove them from their habitations to any other part of this State by force, or shall assemble for that purpose, every person so offending shall be punished by imprisonment in the State prison not exceeding five years, or by fine not exceeding one thousand dollars.

2376. *Exciting insurrection*.—If any person shall excite an insurrection or sedition amongst any portion or class of the population of this State, or shall attempt by writing, speaking, or by any other means to excite such insurrection or sedition, the person or persons so offending shall be punished by imprisonment in the State prison not exceeding twenty years.

## CODE OF GEORGIA.

## CONSTITUTIONAL PROVISION.

5724. *Treason*.—Treason against the State of Georgia shall consist in levying war against her, adhering to her enemies, giving them aid and comfort. No person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or confession in open court.

## ILLINOIS STATUTES (1898).

## TREASON.

## CRIMINAL CODE.

264. *Punishment*.—Treason shall consist in levying war against the government and people of this State in the same, or being adherent to the enemies of this State, giving them aid, advice, and comfort in this State or elsewhere. Any person being thereof duly convicted of open deed by two or more witnesses or voluntary confession in open court, shall suffer the pains and penalties of death; and when the overt act of treason shall be committed without the limits of this State, the person charged therewith may be arrested, tried, and punished in any county in this State, within the

limits of which he may be found; and the offense may be charged to have been committed in the county where he may be arrested.

265. *Misprision of treason.*—Misprisions of treason shall consist in the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. Any person found guilty thereof shall be imprisoned in the penitentiary not exceeding two years.

## REVISED STATUTES OF INDIANA (1881).

### PROVISIONS OF THE CONSTITUTION.

73. *Treason.*—Treason against the State shall consist only in levying war against it and in giving aid and comfort to its enemies.

### STATUTORY PROVISIONS—CRIMES AGAINST THE STATE.

1902. *Treason.*—1. Whoever levies war against this State, or knowingly adheres to its enemies, giving them aid or comfort, is guilty of treason against the State of Indiana, and, upon conviction thereof, shall suffer death or be imprisoned in the State prison during life, in the discretion of the jury.

1903. *Misprision of treason.*—2. Whoever, having knowledge that any person has committed treason or is about to commit treason against this State, willfully omits or refuses to give information thereof to the governor or some judge of the State, as soon as may be, is guilty of misprision of treason, and, upon conviction thereof, shall be imprisoned in the State prison for any period not exceeding twenty-one years and fined in any sum not exceeding ten thousand dollars, and shall also be disfranchised and rendered incapable of holding any office for any period not less than ten years.

## STATUTES OF THE INDIAN TERRITORY.

### CHAPTER 19.—CRIMINAL LAW.

#### IV. *Treason and misprision of treason.*

SEC. 855. Treason against the State shall consist only in levying war against the State, or adhering to its enemies, giving aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or his own confession in open court.

SEC. 856. Any person convicted of treason shall suffer death.

SEC. 857. Misprision of treason shall consist in the knowledge and concealment of treason actually committed by others, without otherwise assenting to or participating in the crime.

SEC. 858. Any person duly convicted of misprision of treason shall be punished by fine not exceeding one thousand dollars and imprisonment not exceeding one year.

## CODE OF IOWA.

### PROVISIONS OF THE CONSTITUTION.

SEC. 16. *Treason.*—Treason against the State shall consist only in levying war against it, adhering to its enemies, or giving them aid or comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.



## PROVISIONS OF THE CRIMINAL CODE.

## TITLE XXIV.—OF CRIMES AND PUNISHMENTS.

CHAPTER I.—*Of offenses against the sovereignty of the State.*

5125. *Treason*.—Whoever is guilty of treason, by levying war against the State, or adhering to its enemies, giving them aid and comfort, shall be punished by imprisonment for life at hard labor in the State penitentiary. Treason is not a bailable offense.

5126. *Misprision of treason*.—If any person have knowledge of the commission of the crime of treason against the State and conceal the same, and not as soon as may be disclose such offense to the governor or some judge within the State, he is guilty of misprision of treason, and shall be fined not exceeding one thousand dollars, or be imprisoned in the penitentiary not exceeding three years nor less than one year.

## GENERAL STATUTES OF KANSAS (1897).

## CHAPTER 100.—OF CRIMES AND PUNISHMENTS.

ARTICLE I.—*Offenses against government.*

SECTION 1. Every person who shall be convicted of treason against the State shall suffer death.

SEC. 2. Misprision of treason shall consist in being a party to any treasonable purpose against this State, or in having and holding correspondence countenancing such treasonable purpose with any person or persons who shall be engaged in setting the same upon foot against the State, or in having knowledge of the existence of a treasonable purpose, or of an act of treason against the State, and failing speedily to make the same known to the governor of this State, and shall, upon conviction, be punished by confinement in the penitentiary for not less than one year nor more than ten years.

SEC. 3. Any citizen of this State who shall join any society or organization the object of which shall be to produce an insurrection or to revolutionize the government of this State or of the United States, or shall furnish arms or military stores to the enemies of this State or of the United States, knowing them to be such, shall upon conviction be punished by confinement in the penitentiary for not less than one nor more than ten years.

SEC. 4. Any person who shall, within the limits of this State, assist in raising the flag of any nation or body of men who are at war with this State or the United States, or shall wear any cockade, badge, or device, intending thereby to show his sympathy with or his adherence to the enemies of this State or the United States, shall be deemed guilty of a misdemeanor, and upon conviction before a justice of the peace shall be punished by a fine of not less than twenty-five nor more than one hundred dollars.

SEC. 5. Whenever either of the crimes described in the first, second, and third sections of this act shall be committed by a citizen of this State, without the limits of the same, the person charged therewith may be arrested, tried, and punished in any county of this State within the limits of which he may be found, and the offense may be charged to have been committed in the county in which he is arrested.

## REVISED LAWS OF LOUISIANA.

## PROVISIONS OF THE CRIMINAL CODE—OFFENSES AGAINST THE STATE AND PUBLIC JUSTICE.

855. *Treason defined*.—Treason against the State shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same

overt act, or his own confession in open court. Whoever shall be guilty of the crime of treason, on conviction, shall suffer death.

856. *Misprision of crimes.*—If any person having knowledge of the commission of any crime punishable with death, or imprisonment at hard labor, shall conceal and not disclose it to some committing magistrate or district attorney, on conviction he shall be fined not exceeding three hundred dollars, and imprisoned at hard labor or otherwise not exceeding twelve months, at the discretion of the court.

## REVISED STATUTES OF MAINE (1883).

### TITLE ELEVEN.

#### CHAPTER 117.—*Offenses against the sovereignty of the State.*

SEC. 1. Treason consists in levying war against the State, adhering to its enemies, and giving them aid and comfort. No person can be convicted of it without the testimony of two witnesses to the same overt act, or confession in open court. Its punishment is imprisonment for life.

SEC. 2. Misprision of treason consists in a knowledge that treason has been, or is to be committed, and in the concealment of it, or in omission to give information thereof to the governor, a judge of a court of record, or a justice of the peace. No person can be convicted of it without the testimony of two witnesses, but one of them may testify to one and another to a different overt act of the same species of treason, or by confession in open court. Its punishment is imprisonment not exceeding five years, or a fine not exceeding one thousand dollars.

## PUBLIC GENERAL LAWS OF MARYLAND.

### TREASON.

264. If any person shall levy war against this State, or shall adhere to the enemies thereof, whether foreign or domestic, giving them aid or comfort, within this State or elsewhere, and shall be thereof convicted, on confession in open court or on the testimony of two witnesses, both of them to the same overt act, he shall suffer death, or be sentenced to confinement in the penitentiary for not less than six nor more than twenty years, at the discretion of the court.

265. If any person shall provide or procure money, goods, or other property, or effects (other than munitions of war) to be used in the levying of war against this State, or in giving aid or comfort to the enemies of this State, within this State or elsewhere, and be convicted thereof, he shall be sentenced to imprisonment in the common jail of the county or city, wherever he may be convicted, for a term not exceeding six months, or to a fine not exceeding five hundred dollars, at the discretion of the court; and if the property or effects so provided or procured consist in part or in the whole of munitions of war, the person so providing or procuring such munitions of war shall, on conviction thereof, be sentenced to confinement in the penitentiary for a term not less than six months or more than two years, or to a fine not less than one hundred nor more than five hundred dollars, at the discretion of the court; and in any and every case the money, goods, property, or effects, so provided or procured, shall be forfeited to the use of the State.

266. If any person or persons shall willfully and for the purpose of promoting rebellion or war against this State burn or destroy any bridge, viaduct, culvert, structure, rails, ferryboat, or other property belonging to and being part of any highway or railroad within this State, or engine, car, vehicle, or property belonging to or being part of any highway or railroad within this State, or engine, car, vehicle, or

property belonging to or used or employed upon any railroad within this State, or shall destroy any dam, lock, abutment, towing-path, wastew weir, or feeder of any canal, or any boat, vessel, or other property belonging to or used or employed thereon, within this State, every such person upon conviction thereof shall be sentenced to undergo confinement in the penitentiary for a term not less than two or more than six years, or to a fine of not less than five hundred nor more than two thousand dollars, in the discretion of the court.

267. If any person or persons within this State shall hold any secret or public meeting, or unite with or belong to any secret club or association known by him or them to be intended to effect, promote, or encourage the separation or secession of this State from the Government or Union of the United States, every such person, upon conviction thereof, shall be sentenced to confinement in the penitentiary for a term not less than two nor more than six years, or to a fine of not less than five hundred or more than three thousand dollars, at the discretion of the court.

268. If any person shall conspire or combine with others to levy war against this State, or to give aid or comfort to the enemies thereof, whether foreign or domestic, within this State or elsewhere, and be convicted thereof, he shall be sentenced to confinement in the penitentiary for not less than two years nor more than six years, or to a fine not exceeding five thousand dollars, at the discretion of the court.

269. If, with intent to promote rebellion or war against this State, or to give aid and comfort to the enemies thereof, any person shall attempt to burn or destroy any bridge, ferryboat, viaduct, culvert, structure, rails, or other property belonging to or being part of any highway or railroad, or any engine, car, vehicle, or other property, either belonging to or used or employed upon any railroad within this State; or if any person or persons shall attempt or conspire with others to destroy any dam, lock, abutment, towing path, waste weir, or feeder of any canal, or any boat, vessel, or other property belonging to or used or employed thereon within this State, every person so offending, upon conviction thereof, shall be sentenced to confinement in the penitentiary for a term not exceeding three years, nor less than one year, or fined in a sum not more than two thousand nor less than five hundred dollars, in the discretion of the court.

270. If any person or persons shall wilfully attempt or conspire to betray, yield, or deliver to any person or persons in rebellion against the government of this State, or to their emissaries, aiders, or abettors, any ship, vessel, or steamboat within this State, every person so offending shall, upon conviction thereof, be sentenced to confinement in the penitentiary for a term not exceeding three years nor less than one year, or fined in a sum not more than two thousand nor less than five hundred dollars, in the discretion of the court.

271. If any person, within this State, shall seduce, entice, or persuade any other person to commit any one of the offences prohibited by sections 264 to 270, inclusive, and such offence be committed, the said person who so seduced, enticed, or persuaded shall, on conviction, be sentenced to suffer such punishment as the person committing said offence would be liable to suffer as a punishment for the crime so committed by him.

272. If any person within this State shall attempt to seduce, entice, or persuade any other person to commit any of the offences prohibited by said sections, though such offence has not been committed, and shall be convicted thereof, he shall be sentenced to confinement in the penitentiary for not less than two years nor more than four years, or to a fine of not less than five hundred nor more than two thousand dollars, in the discretion of the court.

## PUBLIC STATUTES OF MASSACHUSETTS.

[Edition of 1882.]

## OFFENSES AGAINST THE SOVEREIGNTY OF THE COMMONWEALTH.

SECTION 1. Treason against this Commonwealth shall consist only in levying war against the same, or in adhering to the enemies thereof, giving them aid and comfort.

SECTION 2. Whoever commits treason against this Commonwealth shall be punished by imprisonment in the State prison for life.

SECTION 3. Whoever, having knowledge of the commission of treason, conceals the same, and does not, as soon as may be, disclose and make known such treason to the governor, or to one of the justices of the supreme judicial court or superior court, shall be adjudged guilty of the offence of misprision of treason, and be punished by fine not exceeding one thousand dollars, or by imprisonment in the State prison not exceeding five years, or in the jail not exceeding two years.

SECTION 4. No person shall be convicted of treason but by the testimony of two lawful witnesses to the same overt act of treason, whereof he stands indicted, unless he confesses the same in open court.

## GENERAL STATUTES OF MICHIGAN.

## CHAPTER 316.—OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

9072. Every person who shall commit the crime of treason against this State shall suffer the punishment of death for the same.

9073. If any person who shall have knowledge of the commission of the crime of treason against this State shall conceal the same, and shall not, as soon as may be, disclose and make known such treason to the governor thereof, or to some judge of a court of record within this State, he shall be adjudged guilty of the offence of misprision of treason, and shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the State prison not more than five years, or in the county jail not more than two years.

## STATUTES OF MINNESOTA.

[Edition, 1894.]

## TREASON.

§ 6318. "*Treason*" defined.—Treason against the State consists in—

1. Levying war against the State within the same; or,
2. Adhering to the enemies of the State while separately engaged in war with a foreign enemy, in a case prescribed in the Constitution of the United States, or giving to such enemies aid and comfort within the State or elsewhere.

§ 6319.—*Same—Punishment.*—Whoever commits treason against this State shall be punished by imprisonment in the State prison for life.

§ 6320. *Misprision of treason, how punished.*—Whoever, having knowledge of the commission of treason, conceals the same, and does not, as soon as may be, disclose and make known such treason to the governor or one of the judges of the supreme court, shall be adjudged guilty of the offense of misprision of treason, and be punished by fine not exceeding one thousand dollars, or by imprisonment in the State prison not exceeding five years, or in the common jail not exceeding two years.

## REVISED CODE OF THE STATUTE LAWS OF MISSISSIPPI.

[Edition, 1880.]

## TREASON.

§ 2965. Levying war against this State, or adhering to its enemies, giving them aid and comfort, shall be deemed and adjudged treason against this State, and shall be punished with death upon conviction thereof.

§ 2966. No person shall be convicted of treason against this State, unless upon the testimony of two witnesses to the same overt act, or on his own confession in open court.

## PENAL CODE OF MONTANA.

## TITLE III.—OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SEC. 50. Treason against this State consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the State. The punishment of treason is death.

SEC. 51. Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. It is punishable by imprisonment in the State prison for a term not exceeding five years.

## COMPILED STATUTES OF NEBRASKA, 1899.

## TREASON.

## PROVISIONS OF CONSTITUTION.

SEC. XIV. Treason against the State shall consist only in levying war against the State, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

## PROVISIONS OF CRIMINAL CODE.

SEC. 22. (Treason.) Any person or persons residing in this State, who shall levy war against this State, or the United States of America, or shall knowingly adhere to the enemies of this State, or the United States, giving them aid and comfort, shall be deemed guilty of treason against the State of Nebraska, and shall be imprisoned in the penitentiary during life.

SEC. 23. (Accessories.) Any person or persons residing within this State who shall surrender or betray, or be in any way concerned in the surrendering or betraying any military post, fortification, arsenal, or military stores of this State, or the United States, into the possession or power of any enemies of either, or shall supply arms or ammunition or military stores to such enemies, or who shall, unlawfully and without authority, usurp possession and control of any such military post, fortification, arsenal, or military stores, or having knowledge of any treason against this State, or the United States, shall wilfully omit or refuse to give information thereof to the governor, or some judge of this State, or to the President of the United States, shall be imprisoned in the penitentiary not less than ten years nor more than twenty years.

## PUBLIC STATUTES OF NEW HAMPSHIRE.

## CHAPTER 279.—TREASON AND MISPRISION.

SECTION 1. If any person owing allegiance to this State shall levy war or conspire to levy war against it, or shall in any way give aid and comfort to the enemies of this

State, and shall be convicted thereof, either upon confession in open court or by the testimony of two or more witnesses to the same overt act of treason of which such person may be indicted, he shall be adjudged guilty of treason, and shall be imprisoned not exceeding twenty-five years.

SEC. 2. If any person shall know that any other person has committed, or is intending to commit, treason, and shall not give information thereof forthwith to the governor or to some justice of the peace, he shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, or be fined not exceeding two thousand dollars.

SEC. 3. No person shall be tried for treason or misprision of treason unless the indictment therefor is found within two years next after the commission of the offense.

## REVISION OF THE STATUTES OF NEW JERSEY.

[Edition 1877.]

### CRIMES WHICH INVOLVE INJURY TO PUBLIC SAFETY.

[Page 226.]

1. That if any person or persons, owing allegiance to this State, shall levy war against it, or shall adhere to its enemies, or to the enemies of the United States, by giving them aid or comfort within this State or elsewhere, or by giving them advice or intelligence by letters or writing of any kind, or by messages, words, signs, or tokens, or in any way whatsoever within this State or elsewhere, or by procuring for, or furnishing to them, money, or any kind of provisions, arms, or warlike stores within this State or elsewhere, or by bribery, or for reward, or promise thereof, or through favor, partiality, or treachery, yielding or surrendering to them any town or fortress, castles, garrisons, troops, militia, citizen or citizens of this State, or of the United States, or any ship, boat, or vessel of this State, or of the United States, or by giving them aid and comfort in any other way, and shall be thereof convicted or attainted on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he, she, or they shall stand indicted, such person or persons shall be adjudged guilty of treason, and shall suffer death.

2. If any person or persons having knowledge of the commission of any of the treasons aforesaid shall conceal and not, as soon as may be, disclose and make known the same to the governor of this State, or to some one of the justices of the supreme court thereof, or to some one of the justices of the peace in and for any of the counties of this State, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall suffer imprisonment at hard labor for any term not exceeding seven years or be fined not exceeding one thousand dollars, or both, at the discretion of the court before whom such offender or offenders shall be convicted.

3. In all cases wherein heretofore any person or persons would have been deemed or taken to have committed the crime of petit treason, such person or persons shall be deemed and taken to have committed the crime of murder only, and shall be indicted and prosecuted to final judgment accordingly, and the same punishment, and no other, shall be inflicted as in case of murder.

4. If any person owing allegiance to this State shall by speech, writing, open deed, or act, advisedly and wittingly maintain and defend the authority or jurisdiction of any foreign power, potentate, republic, king, state, or nation whatsoever, in and over this State or the people thereof, such person so offending shall, on conviction, be punished by fine or imprisonment, or both, or by fine or imprisonment at hard labor, or both, the fine not to exceed four hundred dollars nor the imprisonment the term of one year.

5. If any person or persons shall, within this State, get up or enter into any combination, organization, or conspiracy, with the intent and purpose of making or attempt-

ing to make a hostile invasion of any other State or Territory of the United States, or shall engage in plotting or contriving any such invasion, or shall knowingly furnish any money, arms, ammunition, or other means in aid of such object, or shall in any way knowingly and willfully aid, abet, or counsel any such combination, organization, or conspiracy, or any such hostile invasion, such person or persons shall be deemed guilty of a high misdemeanor, and shall, on conviction, be punished by fine or imprisonment at hard labor, or both, the fine not to exceed one thousand dollars and the imprisonment not to exceed the term of ten years.

6. If any person or persons having knowledge of the commission of any of the misdemeanors aforesaid shall conceal, and not, as soon as may be, disclose and make known the same to some one of the justices of the peace of the county where the said misdemeanor was committed, he or they shall be deemed guilty of a high misdemeanor, and shall, on conviction, be punished by fine not exceeding four hundred dollars or by imprisonment at hard labor not exceeding one year, or both.

## PENAL CODE OF NEW YORK.

### TITLE IV.—TREASON.

SEC. 37. *Treason defined.*—Treason against the people of the State consists in—

1. Levying war against the people of the State, within this State; or
2. A combination of two or more persons by force to usurp the government of the State or to overturn the same, shown by a forcible attempt, made within the State, to accomplish that purpose; or
3. Adhering to the enemies of the State, while separately engaged in war with a foreign enemy, in a case prescribed in the Constitution of the United States, or giving to such enemies aid and comfort within the State or elsewhere.

SEC. 38. *Punishment of treason.*—Treason is punishable by death.

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SEC. 169. *Conspiracies against peace, etc.*—If two or more persons, being out of this State, conspire to commit any act against the peace of this State, the commission or attempted commission of which, within this State, would be treason against the State, they are punishable by imprisonment in a State prison not exceeding ten years.

## PENAL CODE OF NORTH DAKOTA.

SEC. 7038. If two or more persons, being out of this State, conspire to commit any act against the peace of this State, the commission or attempted commission of which, within this State, would be treason against the State, they are punishable by imprisonment in the penitentiary not less than one and not exceeding ten years.

SEC. 7043. Every person owing allegiance to this State who levies war against it, or adheres to its enemies or gives them aid or comfort within this State, or elsewhere, is guilty of treason. No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act, or his confession thereof in open court. Every person guilty of treason shall, upon conviction thereof, be punished by death, or, at the discretion of the court, shall be imprisoned in the penitentiary not less than five years and be forever incapable of holding any office under this State.

SEC. 7044. Every person owing allegiance to this State and having knowledge of any treason against it who conceals and does not, as soon as may be, disclose the same and make the same known to the governor or the attorney-general or to some judge of this State or of some district thereof, or to the State's attorney of some county or a magistrate thereof, is guilty of misprision of treason, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one and not exceeding five years.

## REVISED STATUTES OF OHIO.

[6th edition, 1894.]

## OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SECTION 6806. Whoever levies war against this State, or the United States, or knowingly adheres to the enemies of either, giving them aid and comfort, is guilty of treason against the State of Ohio, and shall be imprisoned in the penitentiary during life.

SECTION 6807. Whoever, having knowledge that any person has committed treason, or is about to commit treason, willfully omits or refuses to give information thereof to the governor, or some judge of the State, or to the President of the United States, is guilty of misprision of treason, and shall be imprisoned in the penitentiary no more than twenty nor less than ten years.

## GENERAL LAWS OF OREGON.

## CRIMINAL CODE, TITLE II.—OF CRIMES AND THEIR PUNISHMENTS.

CHAPTER I.—*Of the crime of treason.*

1710. The following acts constitute the crime of treason against this State:

1. Levying war against this State within the boundaries thereof; or
2. A combination of two or more persons, by force, to usurp the government of this State or to overturn the same, evidenced by a forcible attempt made within this State to accomplish such purpose;
3. Adhering to the enemies of this State while separately engaged in a war with a foreign enemy, in the cases prescribed in the Constitution of the United States, and giving to such enemies aid and comfort in this State or elsewhere.

1711. To constitute levying war against this State, an actual act of war must be committed. To conspire merely to levy war is not enough.

1712. Where persons rise in insurrection with intent to prevent in general, by force and intimidation, the execution of a statute of this State, or to force its repeal, they are guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance and for a private purpose is not levying war.

1713. Every person convicted of the crime of treason shall suffer death for the same.

## LAWS OF PENNSYLVANIA.

## OFFENSES AGAINST THE STATE.

1. If any person owing allegiance to the Commonwealth of Pennsylvania shall levy war against the same, or shall adhere to the enemies thereof, giving them aid and comfort within the State or elsewhere, and shall be thereof convicted on confession in open court or on the testimony of two witnesses to the same overt act of the treason whereof he shall stand indicted, such person shall, on conviction, be adjudged guilty of treason against the Commonwealth of Pennsylvania, and be sentenced to pay a fine not exceeding two thousand dollars and undergo an imprisonment, by separate and solitary confinement at labor, not exceeding twelve years.

2. If any person, having knowledge of any of the treasons aforesaid, shall conceal and not, as soon as may be, disclose and make known the same to the governor or attorney-general of the State or some one of the judges or justices thereof, such person shall, on conviction, be adjudged guilty of misprision of treason, and shall be sentenced to pay a fine not exceeding one thousand dollars and undergo an imprisonment by separate or solitary confinement at labor not exceeding six years: *Provided always*, That nothing herein contained shall authorize the conviction of any husband or wife for concealing any treasons committed by them respectively.



3. If any person or persons belonging to or residing within this State, and under the protection of its laws, shall take a commission or commissions from any person, State, or States, or other enemies of this State or of the United States of America, or who shall levy war against this State or government thereof, or knowingly and willingly shall aid or assist any enemies in open war against this State or the United States by joining their armies or by enlisting or procuring, or persuading others to enlist for that purpose, or by furnishing such enemies with arms or ammunition, or any other articles for their aid and comfort, or by carrying on a traitorous correspondence with them, or shall form, or be in any wise concerned in forming, any combination, or plot, or conspiracy for betraying this State or the United States of America into the hands or power of any foreign enemy, or any organized or pretended government engaged in resisting the laws of the United States, or shall give or send any intelligence to the enemies of this State or of the United States of America, or shall, with intent to oppose, prevent, or subvert the government of this State or of the United States, endeavor to persuade any person or persons from entering the service of this State or of the United States, or from joining any volunteer company or association of this State about being mustered into service, or shall use any threats or persuasions, or offer any bribe, or hold out any hope of reward with like intent, to induce any person or persons to abandon said service or withdraw from any volunteer company or association already organized under the laws of this Commonwealth for that purpose; every person so offending and being legally convicted thereof shall be guilty of a high misdemeanor, and shall be sentenced to undergo solitary imprisonment in the penitentiary at hard labor for a term not exceeding ten years, and be fined in a sum not exceeding five thousand dollars, or both, at the discretion of the court: *Provided*, That this act shall not prohibit any citizen from taking or receiving civil commissions for the acknowledgment of deeds and other instruments of writing.

4. If any person or persons within this Commonwealth shall sell, build, furnish, construct, alter, or fit out, or shall aid or assist in selling, building, constructing, altering, or fitting out, any vessel or vessels for the purpose of making war or privateering, or other purpose, to be used in the service of any person or parties whatever to make war on the United States of America, or to resist by force or otherwise the execution of the laws of the United States, such person or persons shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to undergo solitary imprisonment in the penitentiary at hard labor not exceeding ten years and be fined in a sum not exceeding ten thousand dollars, or both, at the discretion of the court.

5. No person shall within this State recruit or enlist, or attempt or offer to recruit or enlist, any man or men to serve as volunteer of any other State, or shall in any way procure or attempt to procure any man or men to leave this State for the purpose of enlisting in the volunteers of any other State; and any person offending in the premises, or any of them, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine not exceeding five hundred dollars and be imprisoned at hard labor for a term not exceeding twelve months; and all fines imposed under this act shall be paid to the person who shall have prosecuted the party offending to conviction.

## • GENERAL LAWS OF RHODE ISLAND.

### TITLE XXX.—OF CRIMES AND PUNISHMENTS.

#### CHAPTER 275.—*Of offenses against the sovereignty of the State.*

SECTION 1. Every person who shall be convicted of treason against this State by levying war against the same or by adhering to the enemies of this State, giving them aid and comfort, shall be imprisoned during life.

SEC. 2. Every person who shall have knowledge of the commission of treason against this State by leying war against this State or by adhering to the enemies of the State, giving them aid and comfort, and who shall conceal the same, and shall not as soon as may be disclose and make known such treason to the governor or to some magistrate, shall be deemed guilty of misprision of treason against this State, and shall be imprisoned not exceeding twenty years nor less than five years, or be fined not exceeding ten thousand dollars.

SEC. 3. No person shall be convicted of treason against this State by levying war against the same, or by adhering to the enemies of this State, giving them aid and comfort, but by testimony of two lawful witnesses to the same overt act for which he shall then be on trial, unless he shall in open court confess the same.

SEC. 4. All town meetings of the freemen, inhabitants or residents of this State, or of any portion of the same, for the election of any town, city, ward, county, or State officers, called or held in any town or city in this State, except in the manner, for the purposes, at the times, and by the persons by law prescribed, are illegal and void, and every person who shall act as moderator, warden, or clerk in such pretended meetings hereafter to be held, or in any manner receive, record, or certify votes for the election of any pretended town, city, ward, county, or State officers, shall be deemed guilty of a misdemeanor and shall be fined not exceeding one thousand dollars nor less than five hundred dollars, and be imprisoned for a term of six months: *Provided*, That this section is not intended to apply to cases in which, by accident or mistake, some prescribed forms of calling town and ward meetings of the electors of the several towns and cities of this State shall be omitted or overlooked.

SEC. 5. Every person who shall in any manner signify that he will accept any legislative, executive, judicial, or ministerial office by virtue of any pretended election in any such pretended town, ward, or other meetings, or shall knowingly suffer or permit his name to be used as a candidate therefor, shall be adjudged guilty of a high crime and misdemeanor and be fined not exceeding two thousand dollars and be imprisoned for the term of one year.

SEC. 6. Every person, except he be duly elected thereto according to the laws of this State, who shall assume or exercise any of the legislative, executive, or ministerial functions of the office of governor, lieutenant-governor, senator, member of the house of representatives, secretary of state, attorney-general, or general treasurer of this State, within the territorial limits of the State, as the same are now actually had and enjoyed, either separately or with others, or shall assemble with others for the purpose of exercising any of said functions, shall be imprisoned during life.

SEC. 7. Such meetings as are described in section four of this chapter, and also all meetings of persons other than those authorized by law calling themselves when collected or claiming to be the general assembly of this State or either house thereof, are hereby declared to be riotous, tumultuous, and treasonable assemblies, and the commander in chief, the sheriff of any county, or any deputy sheriff, any justice of the supreme court, the mayors of the cities of Providence and Newport, or in their absence the boards of aldermen of said cities, are hereby authorized and required to command such assemblies or any of them to disperse, and if they do not forthwith obey said command, then, by the civil posse, or, if they deem it necessary, by calling out and using for that purpose the whole or any portion of the military force of this State within their respective jurisdictions that they or either of them may deem sufficient therefor, to disperse such assemblies or any of them within their jurisdictions; and all such officers, civil and military, and persons under their command are hereby directed to govern themselves accordingly.

## CRIMINAL STATUTES OF SOUTH CAROLINA (1894).

## CONSPIRACY.

SECTION 198. If any two or more persons shall band or conspire together, or go in disguise upon the public highway or upon the premises of another, with intent to injure, oppress, or violate the person or property of any citizen because of his political opinion or his expression or exercise of the same, or shall attempt, by any means, measures, or acts, to hinder, prevent, or obstruct any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution and laws of the United States or by the constitution and laws of this State, such persons shall be deemed guilty of a felony, and on conviction thereof be fined not less than one hundred or more than two thousand dollars or be imprisoned not less than six months or more than three years, or both, at the discretion of the court, and shall thereafter be ineligible to and disabled from holding any office of honor, trust, or profit in this State.

## INSURRECTION OR REBELLION.

SEC. 209. Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the government of this State, it shall become impracticable, in the judgment of the governor of the State, to enforce by the ordinary course of judicial proceedings the laws of the State within any county or counties of the State, it shall be lawful for the governor of the State to call forth the militia of any or all of the counties in the State and employ such parts thereof as he may deem necessary to enforce the faithful execution of the laws or to suppress such rebellion.

SEC. 213. The governor of the State, when in his judgment the public safety may require it, is hereby authorized to take possession of any or all of the telegraph lines in the State, their offices and appurtenances; to take possession of any or all railroad lines in the State, their rolling stock, their offices, shops, buildings, and all their appendages and appurtenances; to prescribe rules and regulations for the holding, using, and maintaining of the aforesaid telegraph and railroad lines in the manner most conducive to the interest and safety of the Government; to place under military control all the officers, agents, and employees belonging to the telegraph and railroad lines thus taken possession of, so that they shall be considered a part of the military establishment of the State, subject to all the restrictions imposed by the Rules and Articles of War.

SEC. 214. The governor is authorized to employ as many persons as he may deem necessary and proper for the suppression of such insurrection, rebellion, or resistance to the laws, and for this purpose he may organize and use them in such manner as he may judge best for the public welfare.

SEC. 215. If, during any insurrection, rebellion, or unlawful obstruction of the laws, as set forth in section 209 of this chapter, the governor of the State in his judgment shall deem the public safety requires it, he is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the State or any part thereof, and whenever the said privilege shall be suspended as aforesaid no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the governor; but upon the certificate, under oath, of the officer having charge of anyone so detained that such person is detained by him as a prisoner under the authority of the governor, further proceedings under the writ of *habeas corpus* shall be suspended by the judge or court having issued the said writ so long as said suspension by the governor shall remain in force and said rebellion continue.

## CODE OF TENNESSEE.

[Milliken and Vertres, 1884.]

## TREASON.

5518. Every person inhabiting or residing, or voluntarily coming to inhabit or reside, within the limits of Tennessee, owes and shall pay allegiance to the government thereof.

5519. Treason against the State consists in the following acts committed by any person residing within the State and under the protection of its laws:

1. Taking a commission from or under the authority of the enemies of the State or of the United States.

2. Levying war against the State or the government thereof.

3. Knowingly and wittingly aiding or assisting any enemies at open war against the State or United States—

By joining their armies;

By enlisting, or procuring or persuading others to enlist, for that purpose;

By furnishing such enemies with arms, ammunition, provisions, or any other article for their aid and comfort.

4. Forming, or being in any wise concerned in forming, any combination, plot, or conspiracy for betraying the State or the United States into the hands or power of any foreign enemy.

5. Giving or sending any intelligence to the enemies of the State for that purpose.

5520. Every person so offending, and being thereof legally convicted by the evidence of two sufficient witnesses, or by confession in open court, shall be adjudged guilty of treason against the State, and shall suffer imprisonment in the penitentiary not less than ten or more than twenty years.

5521. If any person has knowledge of the commission of treason, and conceals the same, or does not as soon as may be disclose such offense to the governor, or some attorney-general or judge of the State, he is guilty of misprision of treason and shall, upon conviction, be fined not exceeding one thousand dollars and imprisoned in the penitentiary not more than five years.

## SEDITION.

5555. Whoever shall be guilty of uttering seditious words or speeches, spreading abroad false news, writing or dispersing scurrilous libels against the State or General Government, disturbing or obstructing any lawful officer in executing his office, or of instigating others to cabal and meet together to contrive, invent, suggest, or incite rebellious conspiracies, riots, or any manner of unlawful feud or differences, thereby to stir people up maliciously to contrive the ruin and destruction of the peace, safety, and order of the Government, or shall knowingly conceal such evil practices, shall be punished by fine and imprisonment at the discretion of the court and jury trying the case, and may be compelled to give good and sufficient sureties for his or her good behavior during the court's pleasure, and shall be incapable of bearing any office of honor, trust, or profit in the State government for the space of three years. It shall be the duty of the judge to give this in charge to the grand jury, and no prosecutor shall be required to an indictment under this article.

## STATUTES OF VERMONT (1894).

## TITLE 32.—CRIMES AND OFFENSES.

CHAPTER 211.—*Treason.*

SEC. 4881. A person who, owing allegiance to this State, levies war or conspires to levy war against the same, or adheres to the enemies thereof, giving them aid and comfort, within the State or elsewhere, shall be guilty of treason against this State and shall suffer the punishment of death.

SEC. 4882. Such person may be tried in any county in the State, but shall not be convicted except upon testimony equivalent to two witnesses to the same overt act of treason of which he stands indicted, or upon confession in open court.

SEC. 4883. A person owing allegiance to this State, knowing such treason to have been committed, or knowing of the intent of a person to commit such treason, who does not within fourteen days from the time of having such knowledge give information thereof to the governor of the State, to one of the judges of the supreme court, or to a justice, shall be guilty of misprision of treason, and shall be punished by imprisonment in the State prison not more than ten years and not less than five years, and by fine not exceeding two thousand dollars, or either of said punishments, in the discretion of the court.

## CODE OF VIRGINIA (1887).

## OFFENCES AGAINST THE SOVEREIGNTY OF THE STATE.

SEC. 3658. *Treason defined; how proved and punished.*—Treason shall consist only in levying war against the State or adhering to its enemies, giving them aid and comfort, or establishing, without authority of the legislature, any government within its limits separate from the existing government, or holding or executing, in such usurped government, any office, or professing allegiance or fidelity to it, or resisting the execution of the laws under color of its authority; and such treason, if proved by the testimony of two witnesses to the same overt act, or by confession in court, shall be punished with death.

SEC. 3659. *Misprision of treason; how punished.*—If any person, knowing of such treason, shall not, as soon as may be, give information thereof to the governor, or some conservator of the peace, he shall be punished by fine not exceeding one thousand dollars or by confinement in the penitentiary not less than three nor more than five years.

SEC. 3660. *Attempting, or instigating others, to establish usurped government; how punished.*—If any person attempt to establish any such usurped government, and commit any overt act therefor, or by writing or speaking endeavor to instigate others to establish such government, he shall be confined in jail not exceeding twelve months and fined not exceeding one thousand dollars.

SEC. 3661. *Conspiring to incite the colored population to insurrection against the white population or the white against the colored; how punished.*—If any person conspire with another to incite the colored population of the State to acts of violence and war against the white population, or to incite the white population of the State to acts of violence and war against the colored population, he shall, whether such insurrection be made or not, be punished by confinement in the penitentiary not less than five nor more than ten years.

## CODE OF WEST VIRGINIA.

## CHAPTER CXLIII.—OF OFFENCES AGAINST THE SOVEREIGNTY OF THE STATE.

1. Treason against the State shall consist in levying war against it or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

2. Whoever is guilty of treason against the State shall be punished with death, or, at the discretion of the jury, by confinement in the penitentiary not less than three nor more than ten years, and by the confiscation of his real and personal estate.

3. If any person have knowledge of any treason against the State, and shall not, as soon as may be, give information thereof to the governor or some conservator of the peace, he shall be punished by fine not exceeding one thousand dollars or by confinement in the penitentiary not less than one nor more than five years.

4. If any person shall attempt to justify or uphold an armed invasion of this State or an organized insurrection therein by speaking, writing, or printing, or by publishing or circulating any written or printed document, or in any other way whatever, during the continuance of such invasion or insurrection, he shall be fined not exceeding one thousand dollars and be confined in jail not exceeding twelve months.

## STATUTES OF WISCONSIN, 1898.

## PROVISIONS OF THE CONSTITUTION.

*Treason.*—SECTION 10. Treason against the State shall consist only in levying war against the same or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

## STATUTORY PROVISION.

*Treason.*—SECTION 4510. Any person who shall be guilty of treason against the State shall be punished by imprisonment in the State prison for life.

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This comparison is confined to the existing laws of the United States and States of the Union. There are a number of obsolete enactments with which comparison might be made. During our entire history, whenever there has been in any community a class from whose actions or utterances danger might reasonably be apprehended, the legislative discretion has never hesitated to provide a means of protection; as, for instance, the legislation against the Tories during the Revolution; that against renegade white men who incited the Indians to outbreak and massacres; that against the negroes of the South during the years they were held in slavery; that against the Knights of the Golden Circle and similar secret societies during the civil war, and the several measures now pending in Congress to prevent the promotion of anarchy by seditious utterances.

Respectfully submitted.

CHARLES E. MAGOON,  
*Law Officer, Division of Insular Affairs.*

## INSURRECTION AGAINST THE MILITARY GOVERNMENT IN NEW MEXICO AND CALIFORNIA, 1847 AND 1848.<sup>a</sup>

[Submitted May 31, 1900. Printed as a Senate document by order of the Senate, Fifty-sixth Congress, first session, Doc. No. 442. Case No. 141, Division of Insular Affairs, War Department.]

SIR: I have the honor to call your attention to the official reports of the officers of the United States Army who conducted the military operations for the suppression of the insurrection against the military government established by the United States in New Mexico and certain details connected therewith.

Historical writers have given scant attention to the incidents referred to, probably because they were far removed from the locality in which occurred the more stirring events of the same period. But the questions now occupying the public mind give new interest and increased value to these almost forgotten incidents in our national history.

The conquest of New Mexico by the military forces of the United States was accomplished by the campaign of 1846. (*Leitensdorfer v. Webb*, 20 How., 176.)

In compliance with instructions given by the President, the officer in command, General Kearny, organized a civil government for the occupied territory, and filled the executive and judicial offices by appointment.

These civil functionaries thus appointed entered upon the discharge of their duties in apparent unconsciousness of exposure to more than ordinary peril.

In December, 1846, the native inhabitants organized a conspiracy to overthrow the United States authority in New Mexico. On the night of January 15, 1847, the governor, Charles Bent; the sheriff, Stephen Lee; the circuit attorney, James W. Leal; the prefect, Cornelio Vigil, and a number of others, citizens and officials of the United States and Mexican supporters of the United States authority, were assassinated in the town of San Fernando de Taos. On the same night seven other Americans were killed at Arroya Hondo and two at Rio Colorado.

It was soon apparent that the insurrection was general and the purpose was to kill all the Americans and those Mexicans who had accepted office under the American Government.

Col. Sterling Price was then commander of the army in New Mexico, with headquarters at Santa Fe. He learned of the uprising and attendant atrocities on January 20, 1847, and that the army of insurrection was marching on Santa Fe and the force increasing by enlistments of the inhabitants along the line of march. He deemed it advisable to

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<sup>a</sup>See Rep. Campaign Text Book, 1900, pp. 90, 91.

engage the enemy as soon as possible. He detached a force of about 400 men of his command and marched to meet the approaching insurgents.

He found the insurgents posted in a strong position on the heights and in the houses below on the outskirts of the village of Cañada. The Americans immediately formed in line of battle. The enemy discovered that Colonel Price's artillery and wagon train was some distance in the rear and attempted to capture it, but the attempt was frustrated.

The artillery coming up, the battle was opened with a cannonade and general firing, which lasted for about two hours. Colonel Price then ordered an assault on the position held by the enemy opposite his right flank. The assault was successful and the enemy dislodged. Thereupon Colonel Price ordered a general assault, which was also successful, and the enemy retreated. The approach of night and the character of the ground prevented pursuit. The American loss in killed and wounded was 8 men, among them First Lieutenant Irvine. The Mexican loss was 36 killed; wounded not ascertained.

The next morning the enemy were found to have taken a position on some heights not far distant, but on the approach of the Americans the insurgents retreated.

On the 29th of January, 1847, the Americans again encountered the insurgents at Embudo, a strong pass in the mountains, through which the men could scarcely march three abreast. Between six and seven hundred of the enemy were posted along the slopes of the mountains, and there they were attacked by a detachment of 180 men under Captain Burgwin, who dislodged them with a loss to the Mexicans of 20 killed and 60 wounded. The American loss was 1 killed and 1 severely wounded.

On the 1st of February, 1847, the main body, under Colonel Price, reached the top of Taos Mountain, which was covered with snow 2 feet deep. The marches of the 1st and 2d of February were through this snow, the men being marched in front of the artillery and wagons in order to break a road. On the 3d the American force marched through Fernando de Taos, the town in which Governor Bent and party had been seized and atrociously murdered. The town had been abandoned by the enemy, who had taken a position at the near-by town known as Pueblo de Taos. That was a strongly fortified point. The key to the position was a large church and two large buildings ascending in a pyramidal form seven stories high and pierced with embrasures for rifles. Around these was a wall, and within them the enemy had taken position. The Americans brought up their artillery and battered the church and walls for two hours, but the cannonading was ineffective and the Americans retreated to Fernando.



On the morning of February 4, 1847, the Americans again advanced to renew the assault. The artillery was brought to bear against the two sides of the church. After battering it for two hours, a charge was made under the leadership of Captain Burgwin of the First Dragoons. In this assault Captain Burgwin and several of his men were killed, but the assault was unavailing. The church walls were still unpenetrated by the artillery. Ladders were then made and holes cut in the wall with axes, through which the soldiers with their hands threw fire and lighted shells into the church. Another assault was made on the church door, which again failed with loss. The artillery was then brought up within 60 yards, and after 10 rounds one of the holes which had been cut with the axes was widened into a practicable breach, through which a storming party entered, dislodged the enemy, and took possession of the church. This ended the hostilities of the day. The enemy still occupied the two large buildings. The next morning the enemy surrendered. The number of insurgents engaged in this fight was between 600 and 700. The loss sustained by them was about 150 killed. The number wounded is not known. The American loss in killed and wounded was 52.

Under date of January 23 Captain Hendley, commanding at Las Vegas, N. Mex., reported to Colonel Price as follows:

Every town and village except this (I did not give it time) and Tucoloti have declared in favor of the insurrection. The whole population appear ripe for the insurrection.

On July 30, 1847, Colonel Price, department commander, reported to the Secretary of War as follows:

It is certain that the New Mexicans entertain deadly hatred against the Americans, and that they will cut off small parties of the latter whenever they think they can escape detection.

The insurrection in eastern New Mexico was inaugurated by killing eight Americans at Mora on January 20, 1847. In pursuance of his duty to suppress the insurrection in that locality, Captain Hendley concentrated his grazing guards at Las Vegas, and on January 24, 1847, proceeded in force to Mora. He found a body of Mexicans in arms, prepared to defend the town. A general engagement ensued, the Mexicans retreating and firing from the windows of the houses. A body of insurgents had taken possession of an old fort and opened fire upon the Americans. Captain Hendley succeeded in taking possession of a part of the fort and was preparing to burn it when he fell mortally wounded, dying in a few minutes. The Americans, having no artillery with which to reduce the fort, retired to Las Vegas. In the battle of Mora the insurgents suffered a loss of 25 killed and 15 taken prisoners. The American loss was 1 killed and 3 wounded. Later in the season Captain Morin, who succeeded Captain Hendley, renewed

the attack upon Mora with a body of men and artillery and razed the towns (Upper and Lower Mora) to the ground.

The principal leader of the insurrection was Manuel Cortez. After the defeat at Pueblo de Taos, Cortez fled across the mountains into eastern New Mexico and continued the hostilities.

In May, 1847, a wagon train and a grazing party were attacked by the insurgents and one or two men killed and a large number of horses and mules captured. Major Edmonson pursued this force and encountered them, nearly 400 strong, in a canyon of the Red River. The American forces engaged them, but after fighting several hours, and succeeding in killing and wounding many Mexicans, were unable to dislodge the enemy and retired. The next day he found the enemy had fled during the night.

In June, 1847, the insurrection affected Las Vegas. Lieut. R. T. Brown and 3 soldiers were killed. Thereupon Major Edmonson made an attack and killed 10 or 12 men. He also found evidence of a new revolt and captured the town, sent about 50 citizens as prisoners to Santa Fe, and burned a mill belonging to the alcalde, whom he thought was implicated in the revolt.

In July, 1847, a party of 31 American soldiers was attacked at La Cienega, and Lieutenant Larkin and 5 other men were killed. On the approach of reinforcements the insurgents fled and were not apprehended.

During the month (July, 1847) Major Edmonson is said to have destroyed the town of Las Pias, with considerable loss to the insurgents, and to have marched by way of Anton Chico to La Cuesta, where were about 400 insurgents under Cortez. Fifty prisoners were taken, the main body of the enemy escaping into the mountains.

Thereafter the insurrection dwindled into depredations committed by various bands of Indians, instigated and led by Mexicans. Hardly a party, large or small, traders or soldiers, crossed the plains of New Mexico without being attacked. Many men were killed and large numbers of horses, mules, and cattle driven off. A company of dragoons escorting Government funds lost 5 men killed and all their animals in June.

In the latter part of 1847 comparative safety was secured by stationing troops at various points. Of the insurgent prisoners, 15 or 20, perhaps more, were tried by court-martial, sentenced to death, and executed. The others were turned over to the civil authorities of the military government for trial in the civil courts. The grand jury indicted 4 of them. The others were discharged for want of evidence or pardoned by the governor. The 4 indicted were charged with treason against the United States Government. One was tried by a jury and convicted. The prisoner challenged the jurisdiction of the

civil court and assailed the indictment on the ground that he was not a citizen of the United States nor bound to yield allegiance to that Government. Strong pressure was brought to bear in his behalf, and the district attorney, Mr. Blair, referred the matter to Washington for instruction. Mr. Marcy, Secretary of War, advised the President as follows:

On the 26th of June, 1847, I wrote to the commanding officer of Santa Fe a letter (a copy of which accompanies this communication) in which the incorrect description of the crime in the proceedings of the court is pointed out. It is therein stated that "the territory conquered by our arms does not become, by the mere act of conquest, a permanent part of the United States, and the inhabitants of such territory are not, to the full extent of the term, citizens of the United States. It is beyond dispute that on the establishment of a temporary civil government in a conquered country the inhabitants owe obedience to it and are bound by the laws which may be adopted. They may be tried and punished for offenses. Those in New Mexico who in the late insurrection were guilty of murder, or instigated others to that crime, were liable to be punished for these acts, either by the civil or military authority, but it is not the proper use of legal terms to say that their offenses were treason committed against the United States; for to the Government of the United States—as the Government under our Constitution—it would not be correct to say that they owed allegiance. It appears by the letter of Mr. Blair, to which I have referred, that those engaged in the insurrection have been proceeded against as traitors to the United States. In this respect I think there was error, so far as relates to the designation of the offense. Their offense was against the temporary civil government of New Mexico and the laws provided for it, which that government had the right and, indeed, was bound to see executed."

For this reason the President declined to exercise the power to pardon vested in him as the chief civil magistrate of the United States, but, as commander in chief of the Army, authorized the military governor to use his discretion in the matter, and the prisoner was pardoned by the governor.

The events resulting from this insurrection did not escape the attention of Congress. That body, on July 10, 1848, passed a resolution calling upon the President for information in regard to the existence of civil governments in New Mexico and California; their form and character, by whom instituted and by what authority, and how they were maintained and supported; also whether any persons had been tried and condemned for "treason against the United States" in New Mexico.

President Polk replied to said resolution by message (dated July 17) received July 24, 1848, in which he discusses the character of military government, taking the position that such a government may exercise the "fullest rights of sovereignty." (See Ex. Doc. No. 70, first session Thirtieth Congress.)

# THE INSURRECTION AGAINST THE MILITARY GOVERNMENT IN CALIFORNIA.

The inhabitants of California at various places rose in revolt against the military government established over them, but with less sanguinary results than followed a similar insurrection in New Mexico.

California was conquered and became subject to military occupation and government by the forces of the United States in 1846. (Cross *v.* Harrison, 16 How., 190.)

At Los Angeles and other points, the United States flag was torn down, and that of Mexico was hoisted in its place. In November, 1846, an action occurred at Domingos Rancho, between a party from the United States frigate *Savannah* and a body of Californians. The latter were fortified and supported by artillery. They gained an advantage over the sailors which raised their courage and excited their hopes.

In December, 1846, Commodore Stockton landed at San Diego, and advanced to Los Angeles and reestablished American dominion and military government.

Soon after this a battle occurred between the Americans under General Kearny and the Mexicans at San Gabriel. In this engagement the Mexicans were defeated with loss, but on the American side several were killed and General Kearny wounded. (See Mansfield's Mexican War, p. 102.)

On May 30, 1847, General Kearny wrote to Colonel Burton, in command at Santa Barbara:

It is understood that the people of Lower California have not the power, if they possessed the disposition, to resist your command, but you must not on that account allow the discipline of your soldiers to relax, but hold them at all times ready to resist or make an attack. (See Senate Doc. No. 18, p. 294, Thirty-first Congress, first session.)

On June 18, 1847, Colonel Mason, commanding Tenth Military Department (California), reported to the Adjutant-General United States Army:

The country still continues to be quiet, and I think will remain so, though the people dislike the change of flags, whatever may be said or written to the contrary, and in the southern part of Upper California would rise immediately if it were possible for Mexico to send even a small force into the country. Nothing keeps them quiet but the want of a proper leader and a rallying point.

I send you a map showing the positions occupied by the troops, the number at each station, and the estimated distance between the posts. You will perceive they are pretty well stretched out, but under existing circumstances it can not well be avoided. We must keep up a show of troops, however small in numbers, at the different points occupied. (Id., p. 297.)

About this time there came into notice one Mauricio Castro, who seemed calculated to become the recognized head of the insurrection; but he was captured at San Jose in April, 1848. Colonel Burton refers to him as "the self-styled political chief of Lower California."

(See report of April 13, 1848, Senate Doc. No. 18, first session Thirty-first Congress, p. 497.)

By January, 1848, the aspect of affairs became so serious that Colonel Mason, the military governor of California, determined to raise a regiment of volunteers for the protection of the government of which he was the head. On January 28, 1848, Colonel Mason wrote to Governor Abernethy, of Oregon:

From intelligence received here yesterday from Commander Shubrick \* \* \* I deem it of the utmost importance to raise a corps of 1,000 men to send to Lower California and Manzanita as early as practicable. (Id., p. 443.)

On the same day, in a letter addressed to Messrs. Swift, Ford & Thompson, Colonel Mason says:

From intelligence received here yesterday from Commodore Shubrick, who took Manzanita on the 11th of November, it becomes of the greatest importance to send him a land force as early as practicable, to enable the United States to hold that port and the ports of La Paz and San Jose in Lower California. \* \* \* Without the aid of this land force, the Commodore writes that the United States flag at San Jose and Manzanita will be hauled down. (Id., p. 445.)

On August 16, 1848, Colonel Mason reports to Gen. R. Jones, Adjutant-General, Washington, D. C., as follows:

HEADQUARTERS TENTH MILITARY DEPARTMENT,

*Monterey, Cal., August 16, 1848.*

SIR: I have the honor to inclose you herewith copies of reports made by Lieutenant-Colonel Burton and the officers under his command, the originals of which were received by me on the 15th of June last. These give a history of the suppression of the insurrection in the peninsula, which in its entire management reflects high credit upon all concerned. I can only draw your attention to the reports of Lieutenant Heywood's defense of San Jose; Captain Steele's rescue of the American prisoners at San Antonio, and of Lieutenant-Colonel Burton's attack upon the enemy at Todos Santos.

The official documents, copies of which and extracts from which are herewith presented, are much more interesting than this inadequate sketch of their contents.

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#### **REPORTS AND PROCLAMATIONS REGARDING THE INSURRECTION AGAINST THE MILITARY GOVERNMENT IN NEW MEXICO.**

President Polk, in his message to Congress dated July 24, 1848, speaking with reference to New Mexico, says:

Whilst this Territory was in our unquestioned possession as conquerors, with a population hostile to the United States, which more than once broke out in open insurrection, it was our unquestionable duty, etc. (Richardson's Comp. Messages of Pres., vol. 4, p. 597.)

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[Report on discovery of conspiracy by Governor Bent.]

SANTA FE, N. MEX., *December 26, 1846.*

SIR: I have been informed indirectly that Col. A. W. Doniphan, who, in October last, marched with his regiment against the Navajo Indians, has made treaty of peace

with them. Not having been officially notified of this treaty, I am not able to state the terms upon which it has been concluded; but, so far as I am able to learn, I have but little ground to hope that it will be permanent.

On the 17th instant I received information from a Mexican friendly to our Government that a conspiracy was on foot among the native Mexicans, having for its object the expulsion of the United States troops and the civil authorities from the Territory. I immediately brought into requisition every means in my power to ascertain who were the movers in the rebellion, and have succeeded in securing seven of the secondary conspirators. The military and civil officers are now both in pursuit of the two leaders and prime movers of the rebellion; but as several days have elapsed, I am apprehensive that they will have made their escape from the Territory.

So far as I am informed, this conspiracy is confined to the four northern counties of the Territory, and the men considered as leaders in the affair can not be said to be men of much standing.

After obtaining the necessary information to designate and secure the persons of the participators in the conspiracy, I thought it advisable to turn them over to the military authorities, in order that these persons might be dealt with more summarily and expeditiously than they could have been by the civil authorities.

The occurrence of this conspiracy at this early period of the occupation of the Territory will, I think, conclusively convince our Government of the necessity of maintaining here, for several years to come, an efficient military force.

\* \* \* \* \*

HON. JAMES BUCHANAN,  
*Secretary of State of the United States.*

C. BENT.

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[Report on the inception of hostilities and assassination of Governor Bent. (Senate Doc. No. 70, first session Thirtieth Congress, p. 18.)]

SANTA FE, *February 16, 1847.*

SIR: It becomes my melancholy duty to announce to you the death of his excellency Charles Bent, the governor of this Territory.

On the morning of the 19th ultimo he was assailed in his private dwelling, in the town of Don Fernando de Taos, by a company of Indians of the Taos Pueblo, in company with a number of the Mexican inhabitants of the town, and put to death with all the horrible details of savage barbarity. There were murdered during the same and following day 12 other Americans and 2 Mexicans in the valley of Taos, among whom were James W. Leal, circuit attorney for the northern district; Stephen L. Lee, and Cornelio Vigil (Mexican), sheriff and perfect of the county of Taos.

After the murder of Governor Bent most of the lower order of Mexicans of the valley of Taos and of the small towns in the vicinity rose en masse and joined the Pueblo Indians in the work of pillage and murder. They organized themselves into a revolutionary army, appointed their leaders, and sent circulars to different parts of the Territory to excite the people to rebellion. Detachments from the rebels fell upon the settlement of the Pofill, where most of the Government stock was herded, all of which they drove off, and upon the town of Lode Mora, where they murdered 8 Americans. The main body of the insurgents, numbering from 1,500 to 2,000 Mexicans and Pueblo Indians, advanced toward Santa Fe, forcing into their ranks many of the better inclined on their route. Upon the first intelligence of their movements and outrages Col. Sterling Price promptly made preparations to march against them.

Colonel Price marched from this capital toward Taos on the 23d ultimo with a force of about 400 men, with four pieces of artillery, and encountered the enemy on the 24th and 29th at Law Cañada and La Embuda, each time defeating them with

considerable loss. He entered the town of Don Fernando on the evening of the 3d instant and immediately attacked the Pueblo town, lying about two miles from Don Fernando, a stronghold of the Pueblo Indians, into which all the Indians and all the Mexican insurgents who had not dispersed after the previous battles had thrown themselves for a last desperate struggle. They defended the town with great bravery, but the incessant and gallant charges of Colonel Price's command succeeded in taking it on the evening of the 4th instant. What remained of the Pueblo surrendered at that time at discretion, agreeing to deliver up their leader in the rebellion, who was brought in, delivered up in two or three days afterwards, and was unfortunately shot by an exasperated soldier while under charge of the guard.

Of the 4 principal leaders of the revolt 2 were slain in battle, 1 was taken and hanged under sentence of a court-martial, and 1 survives, and has not yet been taken.

A small detachment of troops stationed near Lode Mora, in consequence of the murder of the 8 Americans there, dispersed and slew a number of the insurgents and utterly destroyed the town. Some 50 prisoners have been retained by the military and civil authorities for trial as being deeply implicated in the insurrection, and I deem it of the highest importance to the future peace and safety of the Territory that they should be dealt with according to the severest penalties of the laws of the United States when proved guilty as perpetrators of or participators in the late barbarous outrages.

The details of the military operations consequent upon the late disturbances will, no doubt, be communicated to the proper department by the colonel commanding.

The losses sustained by Americans and other citizens by pillage during the late insurrections is estimated to be over \$100,000.

The rebellion seems to be crushed, but from my experience of the character and disposition of this people I apprehend that, should our arms meet with a reverse in Chihuahua or elsewhere south of this Territory, it would be the signal of another outbreak.

\* \* \* \* \*

DONACIANO VIGIL,  
*Secretary of Territory.*

HON. JAMES BUCHANAN,  
*Secretary of State of the United States.*

[Report of Colonel Price on the hostilities in vicinity of Santa Fe. Records War Department.]

HEADQUARTERS ARMY IN NEW MEXICO,  
*Santa Fe, February 15, 1847.*

SIR: I have the honor to submit to you a short account of the recent revolutions in this Territory and a detailed report of the operations of the forces under my command and consequent upon the rebellion.

About the 15th of December last I received information of an attempt to excite the people of this Territory against the American Government. This rebellion was headed by Tomas Ortiz and Diego Archuleta. An officer formerly in the Mexican service was seized, and on his person was found a list of all the disbanded Mexican soldiers in the vicinity of Santa Fe. Many other persons supposed to be implicated were arrested, and a full investigation proved that many of the most influential persons in the northern part of this Territory were engaged in the rebellion. All attempts to arrest Ortiz and Archuleta proved unsuccessful, and these rebels have without doubt escaped in the direction of Chihuahua.

After the arrest above mentioned and the flight of Ortiz and Archuleta the rebellion appeared to be suppressed, but this appearance was deception.

On the 14th of January Governor Bent left this city for Taos. On the 19th of the same month this valuable officer, together with 5 other persons, were seized at Don

Fernando de Taos by the Pueblos and Mexicans and were murdered in the most inhuman manner the savages could devise. On the same day 7 Americans were murdered at the Arroyo Hondo and 2 others at the Rio Colorado. The names of the unfortunate persons thus brutally butchered are as follows:

At Don Fernando de Taos: Charles Bent, governor; Stephen Lee, sheriff; James W. Leal, circuit attorney; Cornelio Vigil (a Mexican), prefect; Narcues Reaubien, son of the circuit judge; Parbleau Harvimtsh (a Mexican).

At the Arroyo Hondo: Simeon Turley, Albert Turbush, William Hatfield, Louis Tolque, Peter Robert, Joseph Marshall, and William Austin.

At the Rio Colorado: Mark Head and William Harwood.

It appeared to be the object of the insurrection to put to death every American and every Mexican who had accepted office under the American Government.

News of these events reached me on the 20th of January, and letters from the rebels, calling upon the inhabitants of the Rio Abajo for aid, were intercepted. It was ascertained that the enemy was approaching this city, and that their force was continually being increased by the inhabitants of the towns along their line of march. In order to prevent the enemy from receiving any further reinforcements in that manner, I determined to meet them as soon as possible. Supposing that the detachment of the necessary troops would weaken the garrison of Santa Fe too much, I immediately ordered up from Albuquerque Major Edmonson, Second Regiment Missouri Mounted Volunteers, and Captain Burgwin, with their respective commands, directing Captain Burgwin to leave one company of dragoons at this post and to join me with the other. Major Edmonson was directed to remain in Santa Fe.

Captain Giddings, Company A, Second Regiment Missouri Mounted Volunteers, was also ordered to join me with his company upon the arrival of Captain Burgwin.

Leaving Lieutenant-Colonel Willock in command of this post, on the 23d of January I marched from this place at the head of Companies D, Captain McMillin; K, Captain Williams; L, Captain Slack; M, Captain Halley, and N, Captain Barber, of the Second Regiment Missouri Mounted Volunteers; Captain Angney's battalion of infantry, and a company of Santa Fe volunteers, commanded by Captain St. Vrain. I also took with me four mountain howitzers, which I placed under the command of Lieut. A. B. Dyer, of the ordnance. My whole force composed 353 rank and file, and, with the exception of Captain St. Vrain's company, were all dismounted. On the march Captain Williams was taken sick, and the command of Company K devolved upon Lieut. B. Y. White. On the 24th of January, at half-past 1 p. m., our advance (Captain St. Vrain's company) discovered the enemy in considerable force near the town of Cañada, their position at that time being in the valley bordering the Rio del Morte. Preparations were immediately made by me to attack them, and it became necessary for the troops to march more rapidly than the ammunition and provision wagons could travel in order to prevent the escape of the enemy or to frustrate them in any attempt they might make to occupy commanding positions. As I entered the valley I discovered them beyond the creek on which the town is situated and in full possession of the heights commanding the road to Cañada and of three strong houses at the bases of the hills. My line of battle was immediately formed. The artillery, consisting of four 12-pound mountain howitzers, being thrown forward on the left flank and beyond the creek, the dismounted men occupying a position where they would be in some degree protected by the high bluff bank of the stream from the fire of the enemy until the wagon train could be brought up, the artillery opened on the houses occupied by the enemy and on the more distant height on which alone the guns could be brought to bear.

The enemy discovering the wagons to be more than a mile in the rear sent a large party to cut them off, and it became necessary to detach Captain St. Vrain's company for their protection. This service was rendered in the most satisfactory manner. As soon as the wagon train had been brought up, I ordered Captain Angney to charge with his battalion of infantry, and dislodge the enemy from the house opposite



the right flank, and from which a warm fire was being poured on us; this was done in the most gallant manner. A charge was then ordered to be made upon all the points occupied by the enemy in any force. Captain Angney with his command, supported by Lieutenant White's company, charged up one hill, while Captain St. Vrain's company turned the same in order to cut off the enemy when in retreat. The artillery, supported by Captains McMillen, Barber, and Slack, with their respective companies, at the same time took possession of some houses (inclosed by a strong corral densely wooded with fruit trees, from which a brisk fire was kept up by the enemy) and of the heights beyond them. Captain Halley's company was ordered to support Captain Angney. In a few minutes my troops had dislodged the enemy at all points, and they were flying in every direction. The nature of the ground rendered pursuit hopeless, and it being near night I ordered the troops to take up quarters in the town. The number of the enemy was about 1,500. Lieutenant Irvine was wounded. In the charge my loss was 2 killed and 6 wounded; of the killed 1 was a teamster who volunteered in Captain Angney's company. The loss of the enemy was 36 killed; wounded not ascertained.

The next morning the enemy showed themselves in some force (I think not less than 400) on the distant heights. Leaving a strong guard in the town, I marched in pursuit of them; but they were so shy and retreated so rapidly that, finding it impossible to get near them, I returned to town.

While at Cañada a number of the horses belonging to Captain Slack's company were brought in by Lieutenant Holcomb.

On the 27th I advanced up the Rio del Morte as far as Luceras, where, early on the 28th, I was joined by Captain Burgwin, commanding Company G, First Dragoons, and Company A, Second Regiment Missouri Mounted Volunteers, commanded by Lieutenant Boone. Captain Burgwin's command was dismounted, and great credit is due to him and his officers and men for the rapidity with which a march so long and arduous was performed. At the same time Lieutenant Wilson, First Dragoons, who had volunteered his services, came up with a 6-pounder which had been sent for from Cañada.

My whole force now comprised 479, rank and file. On the 29th I marched to La Joya, where I learned that a party of 60 or 80 of the enemy had posted themselves on the steep slopes of the mountains which rise on each side of the canyon or gorge which leads to Embudo. Finding the road by Embudo impracticable for artillery or wagons, I detached Captain Burgwin in that direction with his own company of dragoons and the companies commanded by Captain St. Vrain and Lieutenant White. This detachment comprised 180, rank and file.

By my permission Adj. R. Walker, Second Regiment Missouri Mounted Volunteers, accompanied Captain Burgwin. Lieutenant Wilson, First Dragoons, also volunteered his services as a private in Captain St. Vrain's company.

Captain Burgwin, pushing forward, discovered the enemy to the number of between six and seven hundred posted on the sides of the mountains just where the gorge becomes so contracted as scarcely to admit of three men marching abreast.

The rapid slopes of the mountains rendered the enemy's position very strong, and its strength was increased by the dense masses of cedar and large fragments of rock which everywhere offered them shelter. The action was commenced by Captain St. Vrain, who, dismounting his men, ascended the mountain on the left, doing much execution. Flanking parties were thrown out on either side, commanded, respectively, by Lieutenant White, Second Regiment Missouri Mounted Volunteers, and by Lieutenants McIlvaine and Taylor, First Dragoons. These parties ascended the hills rapidly, and the enemy soon began to retire in the direction of Embudo, bounding along the steep and rugged sides of the mountain with a speed that defied pursuit. The firing at the pass of Embudo had been heard at La Joya, and Captain Slack, with 25 mounted men, had been immediately dispatched thither. He now arrived and rendered excellent service by relieving Lieutenant White, whose men

were much fatigued. Lieutenants McIlvaine and Taylor were also recalled, and Lieutenant Ingalls was directed to lead a flanking party on the right slope while Captain Slack performed the same duty on the left. The enemy having by this time retreated beyond our reach, Captain Burgwin marched through the defile, and debouching into the open valley in which Embudo is situated, recalled the flanking parties and entered that town without opposition, several persons meeting him with a white flag.

Our loss in this action was 1 man killed and 1 severely wounded, both belonging to Captain St. Vrain's company. The loss of the enemy was about 20 killed and 60 wounded. Thus ended the battle of the Pass of Embudo.

On the 30th Captain Burgwin marched to Trampas, where he was directed to await the arrival of the main body, which, on account of the artillery and wagons, was forced to pursue a more southern route. On the 31st I reached Trampas, and, being joined by Captain Burgwin, marched on to Chamisal with the whole command. On the 1st of February we reached the summit of the Taos Mountain, which was covered with snow to the depth of 2 feet, and on the 2d quartered at a small village called Rio Chicito, in the entrance of the valley of Taos. The marches of the 1st and 2d were through deep snow. Many of the men were frost-bitten and all were very much jaded with the exertions necessary to travel over unbeaten roads, being marched in front of the artillery and wagons in order to break a road through the snow. The constancy and patience with which the troops bore these hardships deserve all commendation, and can not be excelled by the most veteran soldiers. On the 3d I marched through Don Fernando Taos, and finding that the enemy had fortified themselves in the Pueblo de Taos, proceeded to that place. I found it a place of great strength, being surrounded by adobe walls and strong pickets. Within the inclosures and near the northern and southern walls arose two large buildings of irregular pyramidal form to the height of seven or eight stories. Each of these buildings was capable of sheltering 500 or 600 men. Besides these there were many smaller buildings, and the large church of the town was situated in the northwestern angle, a small passage being left between it and the outer wall. The exterior wall and all the inclosed buildings were pierced for rifles. The town was admirably calculated for defense, every point of the exterior walls and pickets being flanked by some projecting building, as will be seen from the inclosed drawing.

After having reconnoitered the town I selected the western flank of the church as the point of attack, and about 2 o'clock p. m. Lieutenant Dyer was ordered to open his battery at the distance of about 250 yards. A fire was kept up by the 6-pounder and the howitzers for about two hours and a half, when, as the ammunition wagon had not yet come up and the troops were suffering from cold and fatigue, I returned to Don Fernando. Early on the morning of the 4th I again advanced upon Pueblo. Posting the dragoons under Captain Burgwin about 260 yards from the western flank of the church, I ordered the mounted men under Captains St. Vrain and Slack to a position on the opposite side of the town, whence they could discover and intercept any fugitives who might attempt to escape toward the mountains or in the direction of Don Fernando. The residue of the troops took ground about 300 yards from the northern wall. Here, too, Lieutenant Dyer established himself with the 6-pounder and 2 howitzers, while Lieutenant Hassandaubel, of Major Clark's battalion light infantry, remained with Captain Burgwin in command of 2 howitzers. By this arrangement a cross fire was obtained, sweeping the front and eastern flank of the church. All these arrangements having been made, the batteries opened upon the town at 9 o'clock a. m. At 11 o'clock, finding it impossible to break the walls of the church with the 6-pounder and howitzer, I determined to storm that building. At a signal Captain Burgwin, at the head of his own company and that of Captain McMillins, charged the western flank of the church, while Captain Angney, infantry battalion, and Captain Barber and Lieutenant Boone, Second Regiment Missouri Mounted Volunteers, charged the northern wall.

As soon as the troops above mentioned had established themselves under the western wall of the church, axes were used in the attempt to breach it; and, a temporary ladder having been made, the roof was fired. About this time Captain Burgwin, at the head of a small party, left the cover afforded by the flank of the church, and penetrating into the corral in front of that building endeavored to force the door. In this exposed situation Captain Burgwin received a severe wound, which deprived me of his valuable services, and of which he died on the 7th instant. Lieutenants McIlvaine, First Dragoons, and Royall and Lackland, Second Regiment Mounted Volunteers, accompanied Captain Burgwin into the corral; but the attempt on the church door proved fruitless and they were compelled to retire behind the wall. In the meantime small holes had been cut into the western wall and shells were thrown in by hand, doing good execution. The 6-pounder was now brought around by Lieutenant Wilson, who, at the distance of 200 yards, poured a heavy fire of grape into the town. The enemy during all this time kept up a destructive fire upon our troops. About half past 3 o'clock the 6-pounder was run up within 60 yards of the church, and after 10 rounds one of the holes which had been cut with the axes was widened into a practicable breach. The gun was now run up within 10 yards of the wall. A shell was thrown in—three rounds of grape were poured into the breach. The storming party, among whom were Lieutenant Dyer, of the ordnance, and Lieutenants Wilson and Taylor, First Dragoons, entered and took possession of the church without opposition. The interior was filled with dense smoke, but for which circumstance our storming party would have suffered great loss. A few of the enemy were seen in the gallery, where an open door admitted the air, but they retired without firing a gun. The troops left to support the battery on the north were now ordered to charge on that side. The enemy abandoned the western part of the town. Many took refuge in the large houses on the east, while others endeavored to escape toward the mountains. These latter were pursued by the mounted men under Captains Slack and St. Vrain, who killed 51 of them, only 2 or 3 men escaping.

It was now night and our troops were quietly quartered in the houses which the enemy had abandoned. On the next morning the enemy sued for peace, and thinking the severe loss they had sustained would prove a salutary lesson, I granted their supplication, on the condition that they should deliver up to me Tomas, one of their principal men, who had instigated and been actively engaged in the murder of Governor Bent and others. The number of the enemy at the battle of Pueblo de Taos was between 600 and 700. Of these about 150 were killed; wounded not known. Our own loss was 7 killed and 45 wounded. Many of the wounded have since died.

The principal leaders in this insurrection were Tafoya, Pablo Chavis, Pablo Montoya, Cortez, and Tomas, a Pueblo Indian. Of these, Tafoya was killed at Cañada; Chavis was killed at Pueblo; Montoya was hanged at Don Fernando on the 7th instant, and Tomas was shot by a private while in the guardroom at the latter town. Cortez is still at large. This person was at the head of the rebels in the valley of the Mora. For the operations in that quarter I refer you to the subjoined letters from Captains Henley, Separate Battalion Missouri Mounted Volunteers, and Murphy, of the infantry, and Lieutenant McKamey, Second Regiment Missouri Mounted Volunteers.

In the battles of Cañada, Embudo, and Pueblo de Taos the officers and men behaved admirably. Where all conducted themselves gallantly, I consider it improper to distinguish individuals, as such discrimination might operate prejudicially against the just claims of others.

I have the honor to be, very respectfully, your obedient servant,

STERLING PRICE,

*Colonel, Commanding the Army in New Mexico.*

THE ADJUTANT-GENERAL OF THE ARMY,  
Washington, D. C.

SANTA FE, February 16, 1847.

SIR: In obedience to the order of my superior officer, Maj. Lewis M. Clark, commanding the battalion of Missouri Light Artillery, to inform you in his absence from this place of all interesting events which may transpire here, and in which the part of his battalion, stationed at Santa Fe, under my command, may participate, I avail myself of this opportunity to address a few lines to you.

In the last warlike events in New Mexico, from the 23d of January to the 11th of February last, 26 men of said battalion, under the command of Lieut. F. Hassendeubel, of my company, and Lieutenant Dyer, of the Regular Army, took such a share as will do great honor to the battalion to which they belong. In the first fight at Cañada, on the 24th of January last, the artillery alone was exposed to the fire of the enemy for nearly two hours, which was so effective as to wound 5 men out of 20, and with the exception of one man, all had their clothes perforated by bullets. But they all stood like walls and behaved with such coolness and valor as if they had been veterans and not volunteers, hearing for the first time in their lives the bullets of the enemy whistling by. The same soldierlike and laudable spirit animated them in the next two fights before Pueblo de Taos, where three of them were wounded.

\*This Pueblo de Taos is one of the most remarkable places in New Mexico, and I take the liberty to add hereto a plan of the same drawn by Lieutenant Hassendeubel at the very place. The two largest buildings are seven stories high; the base covers nearly an acre, and the walls are from 4 to 6 feet thick. The entrance to these houses is from above, and the interior of this labyrinth, as I may call it, is divided and partitioned off in innumerable small rooms, it is believed in nearly 300.

The structure of the houses in New Mexico is such as to make the use of mortars necessary that will throw a shell of at least 50 pounds. The walls are generally 3 feet thick and built of "adobes," a sort of sun-dried brick of a very soft quality, through which a ball of a 12-pounder will pass without doing any more damage, which in houses of brick or stone is quite different.

I desired very much to participate in these fights myself, but the orders of Colonel Price detained me here in Santa Fe, and when at last an order arrived commanding me to join Colonel Price with 50 men and a 24-pounder howitzer, and I had already started, a counter order reached me on the march commanding me to return to Santa Fe, as Pueblo de Taos was taken and the enemy had surrendered.

I reposed full confidence in my men, when sending them off to fight the battles of their country, that they would conduct themselves as soldiers and men of honor, and, according to the testimony of all officers who were present in this campaign, they have so distinguished themselves by their courage and good discipline as to exceed my just expectations. A great deal of praise is due to Lieutenant Hassendeubel, who, by his brave conduct and his coolness, set a worthy example to the men under his command.

I have, sir, the honor to sign myself your most obedient and humble servant,

WOLDEMAR FISCHER,

*Captain, Commanding Company B,*

*Missouri Light Artillery, and Commander of Fort Maroy.*

Brig. Gen. R. JONES,

*Adjutant-General, U. S. A.*

*List of the killed and wounded at Cañada, Embudo, and Pueblo de Taos.*

## AT THE BATTLE OF CAÑADA, JANUARY 24, 1847.

Names.	Rank.	Company.	Regiment and battalion.	Remarks.
<b>Killed:</b>				
Graham .....	Private .....	Company B .....	Infantry battalion .....	In employ quarter-master.
G. Messersmith .....	Teamster .....	Volunteered for the occasion.	do .....	
<b>Wounded:</b>				
Irvine .....	First lieutenant .....	Company A .....	do .....	Acting adjutant battalion.
John Pace .....	Private .....	do .....	do .....	Slightly.
Caspers .....	First sergeant .....	B. mounted artillery.	Lieutenant Dyer's detachment.	Do.
Aulmon .....	Private .....	do .....	do .....	Severely.
Murphy .....	do .....	C. artillery .....	do .....	
Mezer .....	do .....	B. artillery .....	do .....	

## AT THE BATTLE OF EMBUDO, JANUARY 29, 1847.

<b>Killed:</b>				
Papin .....	Private .....	Santa Fe Volunteers.	Capt. St. Vrain's company.	
<b>Wounded:</b>				
Dick .....	(A negro) .....	Governor Bents's.	Servant .....	Severely wounded.

## AT PUEBLO DE TAOS, ON FEBRUARY 4, 1847.

<b>Killed:</b>				
Atkins .....	Teamster .....	Ammunition wagon.	Employ of quartermaster.	
<b>Wounded:</b>				
Alfred L. Caldwell .....	First sergeant .....	K. Lieutenant White.	Second Regiment Missouri Volunteers.	Mortally wounded (since dead).
James Austin .....	Private .....	do .....	do .....	Do.
James W. Jones .....	Third corporal .....	do .....	do .....	Severely wounded.
Robert C. Bower .....	Private .....	A. Lieutenant E. W. Boone.	do .....	Do.
Saml. Lewis .....	Private .....	M. Captain Halley	Second Regiment Missouri Volunteers.	Do.
T. G. West .....	First lieutenant .....	N. Captain Barbee	do .....	Do.
I. H. Callaway .....	Private .....	do .....	do .....	Do.
John Nagel .....	do .....	do .....	do .....	Do.
John J. Sights .....	do .....	do .....	do .....	Do.
Sam H. McMillan .....	Captain .....	D. Captain McMillan.	do .....	Do.
Henry Fender .....	Private .....	do .....	do .....	Dangerously wounded.
Geo. W. Johnson .....	do .....	do .....	do .....	Do.
Robt. Hewitt .....	do .....	do .....	do .....	Slightly wounded.
Geo. W. Howser .....	do .....	do .....	do .....	Do.
Wm. Ducoing .....	do .....	do .....	do .....	Do.
John Mansfield .....	Lieutenant .....	L. Captain Slack.	do .....	Do.
Jacob Noon .....	Private .....	do .....	do .....	Severely wounded.
Wm. Gibbons .....	do .....	do .....	do .....	Slightly wounded.
G. B. Ross .....	First sergeant .....	G. Captain Burgwin.	First U. S. Dragoons.	Killed.
Brooks .....	Private .....	do .....	do .....	Do.
Beebes .....	do .....	do .....	do .....	Do.
Levey .....	do .....	do .....	do .....	Do.
Hansuker .....	do .....	do .....	do .....	Do.
Captain Burgwin .....	Captain .....	do .....	do .....	Mortally wounded (since dead).
I. Vanroe .....	Sergeant .....	do .....	do .....	Severely wounded.
C. Ingleman .....	Corporal .....	do .....	do .....	Do.
I. L. Linneman .....	do .....	do .....	do .....	Do.
S. Blodget .....	Private .....	do .....	do .....	Do.
S. W. Crain .....	do .....	do .....	do .....	Do.
R. Deets .....	do .....	do .....	do .....	Do.
G. F. Sickenberg .....	do .....	do .....	do .....	Do.
I. Truax .....	do .....	do .....	do .....	Severely wounded (since dead).
Hagenbagh .....	do .....	do .....	do .....	Severely wounded.
Anderson .....	do .....	do .....	do .....	Do.
Beach .....	do .....	do .....	do .....	Slightly wounded.
Hutton .....	do .....	do .....	do .....	Do.

*List of the killed and wounded at Cañada, Embudo, and Pueblo de Taos—Continued.*

AT PUEBLO DE TAOS, ON FEBRUARY 4, 1847—Continued.

Names.	Rank.	Company.	Regiment and battalion.	Remarks.
Wounded:				
Hillerman	Private	G, Captain Burgwin.	First U. S. Dragoons.	Slightly wounded.
Walker, 1st	do	do	do	Do.
Schneider	do	do	do	Severely wounded (since dead).
Shay	do	do	do	Severely wounded.
Near	do	do	do	Do.
Bremen	do	I, Captain Burgwin.	do	Do.
Bielfeld	do	B, Missouri Artillery.	Lieutenant Dyer's detachment.	Do.
Jod	do	do	do	Do.
Kohn	do	do	do	Slightly wounded.
Hart	Sergeant	Captain Angney.	Infantry battalion	Killed.
Ferguson	do	do	do	Badly wounded.
Anll	do	do	do	Do.
Van Valkenberg	Lieutenant	B, Captain Angney.	do	Mortally wounded (since dead).
Gold	Private	Santa Fe Volunteers.	Captain St. Vrain.	Severely wounded.
Mitchell	do	do	do	Slightly wounded.

In addition to the foregoing, Captain Hendly was killed at the town of Mora on the 24th of January last, and on the same day three men were wounded at the same place.

SANTA FE, N. MEX., *February 15, 1847.*

SIR: It becomes my painful duty to inform you of the death of Capt. I. H. K. Burgwin, First Dragoons. The official information I received from Lieut. A. B. Dyer, of the Ordnance Corps, is to this effect:

"Battle at Embudo January 29; Captain Burgwin, commanding 180 men (Americans), defeated 1,500 Mexicans and Indians, killing 20, wounding 50 or 60; Americans' loss, 1 killed and 1 wounded.

"Battle of Pueblo de Taos February 4, 1847. Our troops (under command of Colonel Price), 400; Mexicans and Indians, 1,000. Our loss, 12 now dead, 52 wounded. The enemy defeated; loss, 152 killed, number of wounded not known. Captain Burgwin shot through the right breast at 12.30 p. m.; died at quarter past 7 a. m. February 7, 1847."

The body of Captain B. was brought to this place and buried with military honors by my company on the 13th instant.

Very respectfully, your obedient servant,

WM. N. GRIER,  
*Captain, First Dragoons.*

Lieut. H. W. STAUNTON,  
*Acting Adjutant First Dragoons, Fort Leavenworth, Mo.*

DON FERNANDO DE TAOS, N. MEX., *February 16, 1847.*

COLONEL: I have the honor herewith to transmit the monthly return of the late Capt. I. H. K. Burgwin's company (G, First Dragoons) for the month of January, 1847.

I have signed the return myself, and in order to explain it beg leave to submit the following statement:

On January 23 Captain Burgwin marched with his company from Albuquerque, a town on the Rio Grande, 70 miles distant from Santa Fe, to join Colonel Price. He reached the latter place on January 26. On 28th he joined Colonel Price with his company at a town on the Rio Arriba, 35 miles from Santa Fe in the direction of Taos.

On the 29th he was sent forward in command of a detachment, made up of his own company and about 100 volunteers, to drive the enemy from a stronghold in a mountain pass near a town called Embudo. Early in the day Captain Burgwin found the enemy posted on the heights, in the ravines, and behind all trees and rocks where shelter could be found. The enemy numbered about 500, consisting of Mexicans and Pueblo Indians. Captain Burgwin at once engaged the enemy by ordering Captain St. Vrain's company of citizens and mountain men to dismount and skirmish on the left of the road.

At the same time I was ordered to throw out the dragoons on the right and left. The action lasted about two and one-half hours. The enemy was put to flight with considerable loss and was pursued more than 2 miles from hill to hill through the ravines, and was completely routed and driven beyond the town of Embudo, of which Captain Burgwin took possession and in which his command camped on the night of 29th. In this engagement Captain Burgwin lost 1 man killed and 1 wounded. The enemy lost, so far as could be ascertained, about 20 killed and 60 wounded.

On January 30 Captain Burgwin joined Colonel Price at a town called Trampas, 15 miles from Embudo. On 31st the march was continued toward Taos Valley, which Colonel Price reached on the evening of February 2 with his command. On the evening of 3d a march of 6 miles was made to the Pueblo de Taos.

After an attempt to reduce the place by a bombardment it was found impracticable, and Colonel Price returned to Don Fernando de Taos for the night. Early on the morning of 4th the town of Pueblo de Taos, in which the enemy to the number of 1,000 was fortified, was attacked at different points by the artillery and musketeers.

At about 11 o'clock a. m. Captain Burgwin, in command of his own company and a part of Captain McMillins's company, Missouri Volunteers, charged the town from the front and carried by storm all the outward defenses up to the walls of the church. A simultaneous charge was to have been made on the left flank by a portion of the large force of volunteers stationed there beyond effective rifle range, but from some mistake the dragoons were first in the charging, and for some time were exposed to the galling fire of the enemy through loopholes in the church and main buildings. It was during this period that Captain Burgwin received a mortal wound. The main force, however, coming up soon, carried the church and put many of the enemy to flight. The town was carried and the battle closed near night, having killed about 150 of the enemy.

I assumed command of the dragoons, being the next officer in rank and having served with them in all the engagements.

Capt. I. H. K. Burgwin died on the morning of February 7. In the action of the 4th Company G, First Dragoons, lost 7 killed and 16 wounded, exclusive of the captain.

I am, sir, very respectfully, your most obedient servant,

RUFUS INGALLS,  
*Second Lieutenant, First Dragoons.*

Lieut. Col. C. WHARTON,  
*Commanding First Dragoons, Fort Leavenworth, Mo.*

A true copy.

W. H. STANTON,  
*Second Lieutenant, First Dragoons.*

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HEADQUARTERS, FORT LEAVENWORTH,  
*April 1, 1847.*

SIR: It is with more than ordinary grief that I herewith inclose an official report of the death of Capt. I. H. K. Burgwin, of the First Regiment Dragoons, who was mortally wounded in the battle of Pueblo de Taos on the 4th of February last.

Having known long and intimately the late captain, I can not forbear observing that for personal worth and professional excellence in his particular arm of service the deceased has left no superior behind him. The announcement of his death—this morning learned—has cast a gloom over the hearts of all at this post who ever knew him professionally or personally.

I transmit also a copy of a letter this morning received from Lieutenant Ingalls, now in command of the late Captain Burgwin's company, which furnishes a brief account of the affair of the 29th of January near Embudo and of that of the 4th of February at Pueblo de Taos.

Respectfully, your obedient servant,

C. WHARTON,

*Lieutenant-Colonel First Dragoons, Commanding.*

Brig. Gen. R. JONES,

*Adjutant-General, Washington, D. C.*

P. S.—I have just obtained and send you a printed sheet from the Government printing office at Santa Fe, giving details of the several affairs between our forces and the Mexicans up to the 15th of February last.

C. W.

[Reports on hostilities in vicinity of Las Vegas, in the eastern part of Territory. Records War Department.]

#### HEADQUARTERS GRAZING DETACHMENT,

*Las Vegas, January 23, 1847.*

SIR: Below is an account of the circumstances that have lately transpired in this region.

On the evening of the 20th instant myself and Lieut. N. J. Williams happened at this place just as the town had assembled in general council to hear the same circular read that has (been) forwarded to you from Taos. The alcalde of this (place) declared against the insurrection, and stopped the express and forwarded the letter to you. Early the next day I took possession of this place with part of my command, and have ordered the balance to join me to-day. Lieutenant McKamey has also joined me with his forces. I have ordered the different grazing parties to rendezvous their stock about 7 miles below this place and the men to report themselves here ready for service as quick as possible.

News reached this place this morning that Messrs. Waldo, Culver, and two other Americans had been killed in Mora and that a United States grazing party had been cut to pieces night before last. Yesterday morning I started Lieutenant Hawkins, with 35 men, to find out what had become of some trains that I heard were on this side of the mountains, with orders to bring them in, if possible, as I consider it of great importance that they should be brought in safe.

My movements so far have been in anticipation of your orders, and have (been) such as to place the whole force in this section for offensive and defensive operation. I ordered Lieutenant McKamey to bring up the balance of his forces and some grazers that are near him to this place. To-morrow I expect to go against Mora with part of my force, where it is reported that the Mexicans are embodied. Our ammunition is very short, there only being about 10 rounds of cartridges and 25 pounds each powder and lead that I yesterday got from a Mr. Kid. It is of great importance that I should be quickly supplied.

If you will forward me one or two pieces of artillery, well manned, and plenty of ammunition, I pledge myself to subdue and keep in check every town this side of the mountains. Every town and village except this (I did not give it time) and Tucoloti have declared in favor of the insurrection. The whole population appear ripe for the insurrection. I will try and keep you apprised of all movements in this quarter. It is said that a large force—probably 1,000 men—are marching from



Taos toward Santa Fe, Toma, Ortes, and Archuleta at their head. The Mora men—I do not know what leaders they have, but hope to be better able to tell you in a few days.

I am collecting all the provisions I can at this point, for I think you will find that troops must be kept here, as it would keep San Miguel, Mora, and surrounding country in check.

If you conclude to forward me the artillery, send me word and I will meet it. I want permission to purchase corn to feed from 70 to 100 horses, as some mounted men will be required for two or three weeks. My force by to-morrow or next day will amount, including grazing parties and other Americans that have joined me for protection, to about 225 men, say 175 efficient men, out of which Lieutenant Hawkins is now absent with 35 men.

Hoping that you may approve of what I have already done and send me full instruction and plenty of ammunition,

I remain, your obedient servant,

I. R. HENDLY,

*Captain Company G, Commanding at Vegas.*

Col. S. PRICE.

P. S.—The express sent by Lieutenant-Colonel Willock was attacked at the San Bernal Spring and only escaped by deserting their mules and taking to the mountains afoot. The action against the population here, I would suggest, should be active and vigorous.

I. H. R.

JANUARY 23, 1847—2 o'clock p. m.

SIR: An express has just arrived from Lieutenant Hawkins, at the Mora River, that he had met Captain Murphy, escorted by a detachment of Captain Jackson's company. Lieutenant Hawkins will escort Captain Murphy from Mora to this place, and from here I will go with him myself until I meet an escort from Santa Fe, which I desire you will hurry on as as fast as possible, and let them bring me the artillery if you conclude to send me any. Captain Jackson's men will return from the Mora to meet the trains, which are one day's march from that place. No fresh news about the Mexicans except Lieutenant Hawkins's report that a parcel of the Apache Indians have joined with the Mexicans. So Mr. Wells at the Mora has heard. The escorting of Captain Murphy will much impede my operations here.

Respectfully,

I. R. HENDLY, *Captain, etc.*

Colonel PRICE.

BAGAS (VEGAS), *January 25, 1847.*

SIR: The grazing parties of this part of the country have all assembled at Begos and we are about 250 strong. We learned a few days since that there were a force of Mexicans assembled at Mora town, and on yesterday we started up to that place with a force of 80 men under the command of Captain Hendly for the purpose of ascertaining their strength, and on our arrival we found that there were 150 or 200 men. We halted in the suburbs of the town and were consulting whether we would attack the town or not; and while we were consulting there 4 Mexicans came running down out of the mountains; 6 of us mounted our horses and aimed to cut them off from the town, but the Mexicans came running out to their relief and at that time Captain Hendly ordered the company to mount and charge on them; and they fired on us two or three times and then retreated to their fort, and we cut off 15 and took them prisoners.

We kept up a firing for a considerable length of time. After killing from 15 to 20 we commenced burning and tearing down their houses, and had succeeded in getting

into one end of the fort—Captain Hendly, myself, and about 10 men—and fired on them ten or twelve times, when Captain Hendly received a shot and died immediately. We took him out of the room and carried him some 200 yards. It was then growing late, and being informed that there were from three to five hundred troops started from that place on this morning for Santa Fe, and fearing that they might be called back, we retreated with our men and prisoners to Vegas where we are well fortified, where we arrived with 3 men slightly wounded. If we had one or two pieces of artillery to scare them out of their dens we could whip all the Mexicans this side of the ridge.

Yours, in haste,

T. C. MCKAMEY,  
*Lieutenant.*

Colonel PRICE.

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BAGAS (VEGAS), *January 25, 1847.*

I inclose to you Lieutenant McKamey's report of the battle of Mora town, which commenced this morning and lasted about three hours. I arrived here on the evening of the 23d and did not think it prudent to leave until the command returned from Mora town, which has just returned bringing the dead body of Captain Hendley, the only loss on our side. The loss on the part of Mexicans, so far as ascertained, is 15 killed and 15 prisoners, with whom I will commence my march on the 27th, and expect to arrive in Santa Fe on 30th instant. There is but one provision train on this side of the Raton Mountains. It will encamp at the crossing of the Mora to-morrow night. Mr. Campbell has gone with 15 men to procure fresh cattle to assist it to this place.

I have taken the responsibility to send Lieutenant Oxley, Company O, Second Regiment, in command of 18 men, from Mora back to protect the train, which I hope will prove satisfactory. Companies M and N grazing camps have been robbed of all their animals except five or six; no men killed. The animals at Bent farm have all been taken. Seven men killed at this camp; report says all volunteers, some of them belonging to Captain Jackson's company. The bearer of this will inform you of particulars not prudent to commit to writing.

Yours, respectfully,

W. S. MURPHY,  
*Captain, Int. Mo. Vols.*

P. S.—Romulus Culver, of Chariton; Ludlow Waldo, of Jackson; Mr. Prewit, of Santa Fe; Lewis Cabano, of Missouri, and four or five in company were taken prisoners, robbed, and shot at Mora town on or about the 20th of the month. The leader of the forces at that place is by the name of Cortez.

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HEADQUARTERS NINTH MILITARY DEPARTMENT,

*Santa Fe, July 20, 1847.*

SIR: Since the insurrection of January and February last, a body of Mexicans and Indians, embodied for predatory purposes, have been very annoying along the line of the eastern settlements of this Territory, where many of our grazing camps were established. They did not, however, venture an attack upon any of the detachments in that quarter until the 20th of May last, when the camp of Captain Robinson, separate battalion, Missouri Mounted Volunteers, was surprised, and about 200 horses and mules were driven off. In this affair Captain Robinson lost 1 man killed and 2 wounded.

Information of these events was immediately sent to Major Edmonson, commanding at Vegas, who at once marched in pursuit of the marauders whom he found on the 26th of June in a deep canyon on the Rio Colorado, or, more properly, the Canadian River.

Major Edmonson entered the canyon and a desultory fight ensued, for the particulars of which I refer you to the official report of the engagement, which is herewith sent. This unsuccessful attempt to recapture the lost animals has emboldened the Mexicans and Indians to commit further acts of aggression. On June 27 Lieut. R. T. Brown, Second Missouri Mounted Volunteers, with 2 volunteers and a Mexican guide started in pursuit of some horses which had been stolen at Vegas. Lieutenant Brown found the animals at Las Vallas, a small village about 15 miles south of Vegas, but upon his seizing them the Mexicans resisted and murdered the whole party. As soon as Major Edmonson was informed of the massacre of this party he marched from Vegas, and, surprising the town, shot down a few who attempted to escape and took about 40 prisoners. These prisoners are now confined in this city awaiting their trial.

On the 6th of July the grazing camp of Captain Morin's company (Separate Battalion Missouri Mounted Volunteers) was attacked, Lieutenant Larkin and 4 men were killed and 9 wounded, and all the horses, besides property of every description, fell into the hands of the outlaws. Lieutenant-Colonel Willock, commanding at Taos, immediately marched in pursuit of them, but at length finding it impossible to overtake them returned to Taos.

The forces under my command are now so much diminished by the departure of the companies whose terms of service have expired, that I consider it necessary to concentrate my whole command at this city. Rumors of insurrections are rife, and it is said that a large force is approaching from the direction of Chihuahua. I am unable to determine whether these rumors are true or false, but it is certain that the New Mexicans entertain deadly hatred against the Americans, and they will cut off small parties of the latter whenever they think they can escape detection.

General Orders, No. 14, have been received and promulgated, and it is probable that three or four companies, composed of discharged volunteers and teamsters, formerly in the employment of the assistant quartermaster, may be mustered into the service of the United States at this city.

I have the honor to be, very respectfully, your obedient servant,

STERLING PRICE,

*Colonel, Commanding the Ninth Military Department.*

THE ADJUTANT-GENERAL OF THE ARMY,

*Washington, D. C.*

CAMP NEAR SANTA CLARA SPRINGS, NEW MEXICO,

*June 14, 1847.*

SIR: In compliance with Orders, No. 187, May 16, I proceeded to Las Vegas with Companies B and F, Second Regiment Missouri Mounted Volunteers, and the detachment Laclede Rangers, commanded by Lieutenant Elliott. Upon my arrival at San Magil I was informed that a large party of Shian and Apache Indians had gone to the mouth of the Moro on Red River to join a marauding party of Mexicans and others, numbering 300 to 400, and commanded by the outlaw Cortes, and that small detachments were being sent into the settlements to commit depredations on the property of the citizens and American soldiers. On my arrival at Las Vegas, May 20, being informed that a party of about 50 Indians were in the mountains 30 miles north, having with them about 200 stolen animals, I dispatched Company F, Captain Horine, in pursuit. On the same day Company B, Captain Dent, was sent to disperse a marauding party said to be about 40 miles south of this place.

On the evening of the same day I received information of the surprise of our grazing party under Captain Roberson near Wagon Mound by a party of Indians and Mexicans, in which we lost 1 man killed and 2 wounded, and 250 horses. Being

destitute of mounted men in consequence of the departure of the commands of Captains Horine and Dent on the morning previous, I immediately ordered in the grazing parties from the Ocató. I was thus enabled by the use of some Government animals to mount between 75 and 80 men, with which command I reached Captain Roberson's camp on the evening of the 24th. I there found Captain Brown (with 12 wagons laden with goods belonging to our settlers, Messrs. Rich and Pomroy), who had been attacked the previous day at Santa Clara Springs (8 miles distant) by the Indians, who made a desperate effort to get possession of the wagons. Failing in that attempt, they drove his oxen out of reach of gunshot and deliberately killed them to the number of between 60 and 70. The killing of the cattle was doubtless intended to detain the wagons and thus afford an opportunity to surprise and get possession of them. On the following morning, 25th, leaving about 30 men for the protection of the settlers' wagons, I organized two scouting parties, one under charge of Captain Holoway and the other under charge of Lieutenant Elliot, with direction to rendezvous at Santa Clara Springs the following night. We that day discovered where the enemy had corralled their animals a few days previous in the mountains, about 15 miles south of Santa Clara Springs, but had left in the direction of Red River. On the following morning, after forming an advance or spy party, under command of Captain Holoway, Company E, the remainder were formed into three platoons; No. 1, commanded by Captain Roberson; No. 2, by Lieutenant Elliot, and No. 3 by Lieutenant Brown, Company F. Thus organized, I proceeded to follow the trail discovered on the day previous to the canyon of Red River. I entered it with Captain Roberson's command, leaving the commands of Lieutenants Elliot and Brown behind, the company of spies going some fifty minutes in advance in order to prevent surprise. Descending into the canyon with great difficulty through the rocks, leading our horses and following the meanderings of the Indian trail about half a mile, I discovered three Indians secreted behind the rocks about 200 yards from our trail. Supposing that a large number might be there secreted, and having myself the advantage of the ground, I ordered a halt until the rear of the command should arrive. Whereupon the three Indians, who had no doubt been placed there as sentinels, made a rush for their horses, they being close at hand and ready saddled. They were immediately fired upon, killing one of them and unhorsing another; the two remaining Indians mounted one horse and thus made their escape for the time. We then continued to descend to the bottom of the canyon, and with some difficulty effected a crossing of the river. Pursuing the tracks up the bank of the river, we passed the two Indians above spoken of, who immediately made a desperate attempt to reach the main body of the enemy, who were then in our rear, but were immediately pursued and both slain before they could reach their party. The hills around us were by this time literally covered with Indians and Mexicans, who witnessed the tragedy and opened a fire upon us from every point occupied by them. The bottom of the canyon was so narrow as to expose our men to the fire of the enemy from the hills on either side, which were very rocky and so nearly perpendicular as to render a charge impossible. I determined to recross the river in view of occupying some high points on the opposite side which would at all times command the outlet from the canyon, but the enemy, understanding the order, or anticipating it, got possession of the ford before the men could be rallied, who were somewhat scattered in the pursuit of the two Indians spoken of.

I then returned up the river some half mile and took possession of a point of rocks which was out of gunshot reach from the hills on the opposite side of the river; but being too far from the river to command access to water, I determined to occupy a point more favorably situated, in passing to which Lieutenants Elliot, Miller, and Sursey, who were in the rear, discovered a large party of Mexicans rapidly descending the hill (who had escaped my notice), rallied about 20 men and kept them in

check until the main body got possession of the point last designated. The men were immediately ordered to dismount, conceal their horses as far as possible, and take advantage of the rocks until the enemy should approach sufficiently near to enable us to make a charge, sending at the same time a detachment to the bank of the river to secure the water and prevent the enemy passing up the canyon in our rear. Our troops being thus disposed of, the fight commenced at the three several points and continued without intermission about four hours, the enemy alternately advancing and retreating as new recruits arrived.

About sunset, having driven beyond our reach the Indians and Mexicans, finding a large portion of the troops out of ammunition, many of our men having ceased firing for want of it, and knowing that we would necessarily have to fight our way out of the canyon, as the enemy occupied the passes, I determined to reach the open ground at the top of the canyon before dark, which was effected in good order, except in fording the river, where the enemy, anticipating our movement, were concealed in considerable numbers, opened a hot fire, wounding 2 of our men and killing several horses. After crossing the river we returned the fire of the Indians and drove them back with the loss of 5 killed and several wounded. We then proceeded to the top of the hill in good order, reaching it at dark, whereupon our troops were immediately formed for action; but no enemy appearing, we marched to water and encamped for the night, in view of returning to the canyon the following morning. Our number in the engagement was 77. The number of the enemy could not be correctly ascertained, but have been variously estimated at from 400 to 600. Our loss was 1 man killed and 3 slightly wounded, while the enemy's loss was reported at 41 killed. The number of their wounded could not be ascertained, as they were removed off the field as fast as they fell.

On consulting with the officers the next day, 27th, and finding that that portion of our troops furnished by the grazing parties (composing much the largest portion of the command) were entirely out of ammunition, we were reluctantly compelled to suspend operations until a further supply could be obtained. Upon reentering the canyon we found that the enemy had left on the night after the battle in great haste, leaving horses, cattle, camp equipage, etc., not taking time to scalp or strip our man lost in the action, as is their custom. We pursued them with all possible dispatch to their first camping ground in their retreat, where, from appearances, they had made a division of their property and forces. We continued to follow their traces many miles in the plains, until, getting among large herds of mustangs, or wild horses, it became impossible to track them farther. Our horses being much fatigued and tenderfooted from our travel over the rocks, we returned to our present camp near Wagon Mound. Since the 26th of May (as far as my knowledge extends) there has been no further depredations committed in or marauding parties infesting this portion of the Territory.

Respectfully, yours, etc.,

D. B. EDMONSON,  
*Major, Commanding Detachment, etc.*

Col. S. PRICE,  
*Commanding Army in New Mexico.*

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[Official public proclamations regarding insurrections. Records War Department.]

ARMY OF THE WEST—MASSACRE OF GOVERNOR BENT AND OTHER AMERICANS AT TAOS—  
BATTLES OF CAÑADA, ELEMBOA, TAOS, AND MORO—AMERICANS VICTORIOUS.

On the 13th of January, 1847, Charles Bent, governor of the Territory of New Mexico, left Santa Fe, the seat of government, for Taos, his place of residence. While there the friends of two Pueblo Indians who were confined in prison at that

place requested him to release them, to which he replied that, although governor of the province, it was entirely out of his power to release any one confined by law until they were tried. They then resolved to release the prisoners by force and murder all the Americans in Taos, together with those Mexicans who had either accepted office under the American Government or were favorable to Americans. On the Tuesday following they effected their resolution, releasing the prisoners and barbarously murdering and scalping Governor Bent; Stephen Lee, sheriff; James W. Leal, circuit attorney; Cornelio Vigil (a spaniard), perfect; Narcesses Beaubien, and Parbleau Herrmeah, sparing but one American, named Elliott Lee. Leal was scalped alive. At the Arro Onlo, 12 miles from Taos, the following men fortified themselves in a house, and after standing a siege of two days were taken and murdered: Simeon Turley, Albert Cooper, William Hatfield (a volunteer), Louis Folque, Peter Robert, Joseph Marshall, William Austin, Mark Head, and William Harwood. The number of Mexicans and Indians engaged in this massacre has been estimated at 300.

On the morning of the 20th of January intelligence of the massacre of Governor Bent was brought to Santa Fe by an Indian runner. A circular letter was also received by the priest at this place stating that the Mexicans and Indians of Taos had risen against the invaders of their country, and requesting him to join them. This letter was handed to Colonel Price by the priest. Various reports reached this place of the advance of the enemy and their near approach. In consequence of these reports Colonel Price determined to march out of Santa Fe and meet them in the open field. He took with him 340 men, composed of Captain Angney's battalion of infantry, portions of six companies of the Second Regiment, and a company of citizens and mountaineers under the command of Captain St. Vrain, leaving Lieutenant-Colonel Willock in command of his post with a force composed of his own battalion, three companies of the Second Regiment, a portion of Captain Fischer's company of light artillery, and one company of regulars. On the evening of the 24th Colonel Price encountered the enemy at Cañada, numbering about 2,000 men, under the command of Gens. Jesus Tafoya, Pablo Chavez, and Pablo Montoya.

The enemy were posted on the hills commanding each side of the road. About 2 o'clock p. m. a brisk fire from the artillery, under the command of Lieutenants Dyer (of the Regular Army) and Harsentiver, was opened upon them, but from their being so much scattered it had but little effect.

The artillery were within such short distance as to be exposed to a hot fire, which either wounded or penetrated the clothes of 19 out of the 20 men who served the guns. Colonel Price, seeing the slight effect which the artillery had upon them, ordered Captain Angney with his battalion to charge the hill, which was gallantly done, being supported by Captain St. Vrain, of the citizens, and Lieutenant White, of the Carrol companies. The charge routed them, and a scattering fight ensued, which lasted until sundown. Our loss was 2 killed and 7 wounded. The Mexicans acknowledged a loss of 36 killed and 45 taken prisoners. The enemy retreated toward Taos, their stronghold. Colonel Price, on the 27th, took up his line of march for Taos, and again encountered them at El Emboda on the 29th. They were discovered in the thick brush on each side of the road at the entrance of a defile by a party of spies, who immediately fired upon them. Captain Burgwin, who had that morning joined Colonel Price with his company of dragoons, hearing the firing, came up, together with Captain St. Vrain's and Lieutenant White's companies. A charge was made by the three companies, resulting in the total rout of the Mexicans and Indians. The battle lasted about half an hour, but the pursuit was kept up for two hours.

The march was resumed on the next day and met with no opposition until the evening of the 3d of February, at which time they arrived at the Pueblo de Taos, where

they found the Mexicans and Indians strongly fortified. A few rounds were fired by the artillery that evening, but it was deemed advisable not to make a general attack then, but wait until morning. The attack was commenced in the morning by two batteries under the command of Lieutenants Dyer and Wilson, of the Regular Army, and Lieutenant Harsentiver, of the light artillery, by throwing shells into the town. About 12 o'clock m. a charge was ordered and gallantly executed by Captain Burgwin's company, supported by Captain McMillan's company, and Captain Angney's battalion of infantry, supported by Captain Barbee's company. The church which had been used as a part of the fortifications was taken by this charge. The fight was hotly contested until night, when two white flags were hoisted, but were immediately shot down. In the morning the fort was surrendered. In this battle fell Captain Burgwin, than whom a braver soldier or better man never poured out his blood in his country's cause.

The total loss of the Mexicans in the three engagements is estimated at 282 killed; the number of their wounded is unknown. Our total loss was 11 killed and 47 wounded, 3 of whom have since died.

*Killed*.—Privates Messersmith, Graham, Papin, First Sergt. A. L. Caldwell, Private R. T. Bower, First Sergt. G. B. Ross, Privates Brooks, Levicy, Hansuker, J. Truax, and Sergeant Hart.

*Wounded*.—Colonel Price, Capt. J. H. Burgwin (since died), First Lieutenant Van Valkenberg (since died), Captain McMillan, First Lieutenant Irwin, First Lieut. T. G. West, Lieut. J. Mansfield, Sergts. A. V. Aull, Caspers, J. Vanroe, Furguson, Corporals Jones and Ingleman, Privates Aulman, Murphy, Mezer, James Austin, A. Lewis, J. H. Calaway, John Nagle, J. J. Sights, Henry Fender, Johnson, R. Hewitt, Howser, Ducoing, J. Moon, Gibbons, J. L. Linneman, S. Blodgett, Crain, R. Deets, G. T. Sickenberg, Hagenbaugh, Anderson, Beach, Hutton, Hillimae, Walker, Schneider, Shay, Near, Bremen, Bielfeldt, Jod, Kohn.

On the 25th ultimo Captain Hendly (of Colonel Willock's battalion), who was in command of the grazing parties on the Rio Moro, marched with 80 men to the town of Moro to suppress the insurrection there and arrest the murderers of Messrs. Culver, Waldo, Noyes, and others, who were massacred at that place.

He found a body of Mexicans under arms prepared to defend the town, and while forming his men into line for attack a small party of the insurgents were seen running from the hills. A detachment was ordered to cut them off, which was attacked by the main body of the enemy. A general engagement immediately ensued, the Mexicans retreating to the town and firing from the windows and loopholes in their houses. Captain Hendly and his men closely pursued, rushing into their houses with them, shooting some, and running others through with bayonets.

A large body of the insurgents had taken possession of an old fort and commenced a fire from the loopholes upon the Americans. Captain Hendly, with a small party, had taken possession of an apartment in the fort and, while preparing to fire it, was shot by a ball from an adjoining room. He fell, and died in a few minutes. Our men, having no artillery and the fort being impregnable without it, retired to Las Vegas. The enemy had 25 killed and 17 taken prisoners. Our loss, 1 killed and 2 or 3 wounded.

On the 1st instant, Captain Morin, who had been ordered from Santa Fe by Colonel Willock to succeed Captain Hendly in the command, proceeded with a body of men and one piece of cannon to Moro and razed the towns (Upper and Lower Morro) to the ground, the insurgents having fled to the mountains. Several Mexicans were captured, supposed to be concerned in the murder of Messrs. Culver, Waldo, and others, and after many threats were forced to show where the bodies were buried. Seven of them were found and carried to Las Vegas for interment.—Government Printing Office, Santa Fe, February 15, 1847.

The following reports and proclamations were made by Donaciano Vigil, who became provisional governor after the death of Governor Bent (see Ex. Doc. No. 70, Thirtieth Congress, first session, pp. 20 et seq.):

TRIUMPH OF PRINCIPLES OVER TURPITUDE.

*The provisional governor of the Territory to its inhabitants.*

FELLOW-CITIZENS: The gang of Pablo Montoya and Cortez, in Taos, infatuated in consequence of having sacrificed to their caprice his excellency the governor and other peaceable citizens, and commenced their great work of plunder by sacking the houses of their victims, according to principles proclaimed by them, for the purpose of making proselytes, yesterday encountered in the vicinity of La Cañada the forces of the Government restorative of order and peace, and in that place, unfortunately for them, their triumph ended, for they were routed with the loss of many killed and 44 prisoners, upon whom the judgment of the law will fall.

Their hosts were composed of scoundrels and desperadoes, so that it may be said that the war was one of the rabble against honest and discreet men; not one of the latter has as yet been found among this crew of vagabonds, unless, perhaps, some one actuated by the fear of losing his life while in their power or of being robbed of his property. The Government has the information, and congratulates itself that within ten days the inquietude caused you by the cry of alarm raised in Taos will cease, and peace, the precursor of the felicity of the country, will return to take her seat on the altar of concord and reciprocal confidence.

The ringleaders of the conspiracy, if they should be apprehended, will receive the reward due to their signal crimes, and the Government, which for the present has been compelled to act with energy in order to crush the head of the revolutionary hydra which began to show itself in Taos, will afterwards adopt lenient measures, in order to consolidate the union of all the inhabitants of this beautiful country under the ægis of law and reason.

I hope, therefore, that, your minds being now relieved of past fears, you will think only on the security and protection of the law; and, uniting with your Government, will afford it the aid of your intelligence, in order that it may secure to you the prosperity desired by your fellow-citizen and friend,

DONACIANO VIGIL.

SANTA FE, January 25, 1847.

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*The provisional governor of the Territory to its inhabitants:*

FELLOW CITIZENS: Your regularly appointed governor had occasion to go on private business as far as the town of Taos. A popular insurrection, headed by Pablo Montoya and Manuel Cortez, who raised the cry of revolution, resulted in the barbarous assassination of his excellency the governor, of the greater part of the Government officials, and some private citizens. Pablo Montoya, whom you already know, notorious for his insubordination and restlessness, headed a similar insurrection in September, 1837. Destitute of any sense of shame, he brought his followers to this capital, entered into an arrangement, deserted, as a reward for their fidelity, the unfortunate Montoyas, Esquibal, and Chopon, whose fate you know, and retired himself, well paid for his exploits, to his den at Taos. The whole population left the weight of their execration fall on others, and this brigand they left living on his wits—for he has no home or known property and is engaged in no occupation. Of what kind of people is his gang composed? Of the insurgent Indian population of Taos, and of others as abandoned and desperate as their rebellious chief. Discreet and respectable men are anxiously awaiting the forces of the Government in order to be relieved from the anarchy in which disorder has placed them, and this relief will speedily be afforded them. In the year 1837 this mischievous fool took, as a



motto for his perversity, the word "Canton," and now it is "The reunion of Taos!" Behold the works of the champion who guides the revolution! And can there be a single man of sense who would voluntarily join his ranks? I should think not.

Another of his pretended objects is to wage war against the foreign government. Why, if he is so full of patriotism, did he not exert himself and lead troops to prevent the entry of American forces in the month of August, instead of glutting his insane passions and showing his martial valor by the brutal sacrifice of defenseless victims, and this at the very time when an arrangement between the two Governments, with regard to boundaries, was expected? Whether this country has to belong to the Government of the United States or return to its native Mexico, is it not a gross absurdity to foment rancorous feelings toward people with whom we are either to compose one family or to continue our commercial relations? Unquestionably it is.

To-day or to-morrow a respectable body of troops will commence their march for the purpose of quelling the disorders of Pablo Montoya in Taos. The Government is determined to pursue energetic measures toward all the refractory until they are reduced to order, as well as to take care of and protect honest and discreet men; and I pray you that, hearkening to the voice of reason, for the sake of the common happiness and your own preservation, you will keep yourselves quiet and engaged in your private affairs.

The term of my administration is purely transitory. Neither my qualifications nor the ad interim character, according to the organic law in which I take the reins of government, encourage me to continue in so difficult and thorny a post, the duties of which are intended for individuals of greater enterprise and talents; but I protest to you, in the utmost fervor of my heart, that I will devote myself exclusively to endeavoring to secure you all the prosperity so much desired by your fellow-citizen and friend,

DONACIANO VIGIL.

SANTA FE, *January 22, 1847.*

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[Circular.]

SUPREME GOVERNMENT OF THE TERRITORY.

When a father of a family neglects or, more properly speaking, feigns not to perceive the misbehavior of his children, and permits them to escape merited punishment, their propensity to indulge in excesses continually increases until the habit is so confirmed that not even the severe punishment imposed by laws is sufficient to check them in the career which they have marked out for themselves; and the same is the case with a whole people under similar circumstances. Taos, whose beautiful valley rewards with abundant fruit the labors of industry, sheltered in her bosom a class of population wholly demoralized, the history of whose civil existence is a record of a series of crimes. In the year 1837 the flames of the revolution of La Canada having been extinguished, they were kindled anew in this valley. The timely measures adopted by General Armijo to quench them and the execution of some rebels who were taken between this and La Canada gave peace to the country for a time, and order was in appearance reestablished; but as the rebels were not punished with due severity at the very places where they had confederated, nor subjected to the necessary restrictions, they remained unawed. Very soon, therefore, after their rout at the little gap these people of Taos began to manifest the evil intentions which they harbored in their bosoms, in consequence of the impunity of their first crimes and of those which they have successively committed, until that which they recently perpetrated with so much savage inhumanity, which has covered us with mourning and plunged us in grief and sad recollections.

In the year 1843 they rose and sacked the tithe granaries situated at various points in the valley of Taos, and the Government, shrinking from the duty of punishing

this excess and castigating at least the principal culprits, approved, or, for some reason, so completely overlooked it, that no notice was taken of the affair. Encouraged by the impunity which attended this crime, in the beginning of July in the same year they reassembled with criminal views of a more enlarged nature, for they proposed to themselves and attempted, in the first place, to kill the few Americans and French who had married and settled among them; and although they did not consummate this, owing as well to want of unanimity among themselves as to their failing to effect a surprise, they sated their rapacity by plundering the stores and houses of the wealthiest foreigners. The local authorities, with the view of quieting the complaints of the injured individuals, commenced some proceedings which, from the mode in which they were carried on, necessarily led to no result. On this application was made to the Government, but with the same result; and finally, after much expense and trouble, through the indifference and connivance of the said authorities and of the Government, the injured parties were ruined, and the miscreants who perpetrated the crime were left to enjoy in absolute impunity the fruit of their plunder.

The apathetic and criminal conduct of the previous administrations with respect to popular commotions gave so much encouragement to the perpetrators of these crimes that those who originated the plan of the revolution which has just been quelled found no difficulty whatever among the people of Taos, already adepts in such proceedings.

According to statements made by Indians of the town of Taos, who have appealed to the clemency of the commander of the forces employed in the restoration of order, the same Diego Archuleta who, in the middle of December, last year, planned a revolution in this city, which, being discovered in time by the Government, was quelled before it burst forth, is the individual who, before flying from the country, aided by the so-called Generals Pablo Montoya, Manuel Cortez, Jesus Tafoya, and Pablo Chavez, instigated them to the insurrection and proceedings which they carried into execution, and persuaded them that they might enter Santa Fe without resistance, and might subsequently with little trouble destroy or drive out of the country all the forces of the Government.

The individuals mentioned are, so far as now known, the chiefs of this band of murderers and thieves. Diego Archuleta fled in a cowardly manner from the territory before the commencement of the revolution which he himself planned and counseled; Chavez and Tafoya fell in the action, Montoya was executed at Taos, and the assassin Cortez is wandering a fugitive in the mountains. There are besides at the disposal of the tribunals various individuals arranged as accomplices, upon whom, if guilty, the judgment of the law will fall.

The Government troops triumphed over the rebels successively at La Canada, Embubo, and Taos, where the victory was decisive. There were killed in the field and town of Taos about 200 rebels; the remainder begged their lives and a pardon, which was granted them, and they were left at liberty to pursue their occupations in the security and peace which they themselves had disturbed.

In giving you information of recent occurrences I have profited by the occasion to state in detail the misfortunes which have heretofore afflicted this territory, and the causes to which they are to be attributed, in order that public officers engaged in the sphere of their duties may redouble their efforts to preserve order, and that good citizens may contribute by their influence, their talents, and their patriotism to the same object, and that they may exhort the people to industry—the only source of riches.

By these means, under the protection of a strong government and of the just laws which govern us, you will be happy, and that is what is most desired by your best friend,

DONACIANO VIGIL.

SANTA FE, *February 12, 1847.*

SANTE FE, *March, 1847.*

SIR: Since my letter of the 16th February a number of persons engaged in the late rebellion have been brought to trial before the United States district court for this Territory. Antonio Maria Trujillo was found guilty of treason, and received the sentence of the court.

A petition was immediately laid before me, signed by the presiding justice, one of associate justices, United States district attorney, the counsel for the defense, most of the members of the jury before whom the accused was tried, and many of the most respectable citizens, praying that the execution of the sentence of the court be suspended until a petition could be laid before the President of the United States for the pardon of the prisoner, on the ground of his age and infirmity.

Though feeling assured that the accused had had a fair trial, and had been justly sentenced and legally convicted, I still feel justified in granting the prayer of the petition, signed as it was by the court and the jury before whom he was tried and convicted.

I am informed that a petition will be immediately forwarded to the President praying for the pardon of Trujillo on the ground above stated. I trust the President will give the matter careful consideration. The prisoner is about 75 years of age necessarily infirm, and evidently near the end of his days; and, although as the head of an influential family, much was done in his name to excite and forward the late rebellion, still, on account of his years and the near termination of his career, I can not but consider him a proper subject for the mercy of the Government.

The United States district court is still in session at this capital, having under trial three indictments for treason against three prominent persons in the late rebellion. Twenty-four prisoners have been discharged for want of testimony to indict them for treason, and also on the ground that they have been under the influence and deceived by the representations of men who had always exercised tyrannical control over them.

I am informed that there are upward of 40 prisoners confined in the northern district awaiting their trial at the coming term of the United States district court for that district.

I can not do less than commend the diligence and at the same time the fairness and justice with which the tribunals of the Territory discharge their duties.

With the highest sentiments of esteem, truly, your obedient servant.

DONACIANO VIGIL.

HON. JAMES BUCHANAN,

*Secretary of State, United States.*

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SANTA FE, *March 26, 1847.*

SIR: A few days since the colonel commanding received a deputation of principal men from the Navajo Indians, from whom he exacted a promise that all the prisoners and stock taken in their late marauding expeditions against the settlements of the southern district should be restored by the end of the present month.

I have no confidence of the fulfillment of the promise; indeed, these Indians continue to commit daily outrages in the disregard of their promise. I hope measures will be immediately taken by the officer in command here to compel not only a restitution of property and prisoners, but to secure for the future respect for our arms and Government and a lasting submission on the part of these turbulent savages. The interest and prosperity of the Territory urgently demands it.

In the late attacks of these Indians many citizens have been deprived of their all, and unless something be speedily done to prevent further depredations the native citizens will have just cause to complain that the promises made to them by Brigadier-General Kearny, to the effect that they should be protected against these Indians, their ancient enemies, has been shamefully violated and disregarded.

It is with feelings of the highest gratification that I am able to announce that Col. A. W. Doniphan entered the city of Chihuahua on the 1st instant, having met the enemy on the day previous at Sacramento, some 18 miles from the city, upward of 4,000 strong, and in an action of three hours, with his command of 1,400 men, including the wagoners of the merchants' caravans, gained a victory almost unprecedented in history, putting the enemy to flight, leaving 169 dead on the field, while the command lost only 2 killed and 7 wounded.

I can not close without again urging upon the Government the absolute necessity of replacing the present volunteer force in this Territory by a force of Regular troops, on the ground of greater economy, expediency, and efficiency. In my opinion, both the interests of the United States and of this Territory clearly demand it.

With sentiments of the highest esteem, truly, your obedient servant,

DONACIANO VIGIL.

Hon. JAMES BUCHANAN,  
*Secretary of State of the United States.*

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[Reports on the insurrection against the military government instituted by the United States in California. (See Senate Doc. No. 18, first session Thirty-first Congress, pp. 488-504.)]

No. 36.]

HEADQUARTERS TENTH MILITARY DEPARTMENT,  
*Monterey, Cal., August 16, 1848.*

SIR: I have the honor to inclose you herewith copies of reports made by Lieutenant-Colonel Burton and the officers under his command, the originals of which were received by me on the 15th of June last. These give a history of the suppression of the insurrection in the peninsula, which in its entire management reflects high credit upon all concerned. I can only draw your attention to the report of Lieutenant Heywood's defense of San Jose; of Captain Steele's rescue of the American prisoners of war at San Antonio, and of Lieutenant-Colonel Burton's attack upon the enemy at Todos Santos.

\* \* \* \* \*

R. B. MASON,  
*Colonel First Dragoons, Commanding.*

Gen. R. JONES,  
*Adjutant-General, Washington, D. C.*

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BARRACKS, LOWER CALIFORNIA,  
*San Jose, February 20, 1848.*

SIR: I continue my report from the 22d ultimo, from which time my force consisted of 27 marines and 15 seamen, of whom 5 were on the sick report, besides some 20 volunteers, Californians, who at least served to swell the numbers. From that date the enemy were continually in sight of us, intercepting all communication with the interior and driving off all the cattle from the neighborhood. A party of our own men who went out to endeavor to obtain cattle were driven in and narrowly escaped being cut off. We succeeded in obtaining a few cows, however, which were very necessary to us in the reduced state of our provisions, as, in addition to our garrison, we were obliged in humanity to sustain some 50 women and children of the poor, who sought our protection in the greatest distress. I found it necessary, as soon as our fresh beef was consumed, to put all hands on half allowance of salt provisions. We had no bread. On the 4th of February the enemy closed around us once more and commenced firing upon all who showed themselves at our portholes

or above the parapets. On the morning of the 6th the enemy appeared to be a little scattered, a considerable force being seen riding about some distance from the town, and at the same time a strong party of them, posted at the lower end of the street, were keeping up an annoying fire upon us. I judged this a favorable opportunity to make a sortie upon them, and, taking 25 men with me, closed with them and dislodged them, driving them into the hills without the loss of a man on our part, and returned to the cuartel.

On the morning of the 7th it was reported to me that the enemy had broken into the houses on the main street, and there was some property exposed which might be secured. I took a party of men and went down and brought up a number of articles belonging to the Californians who were in the cuartel; some distant firing took place, but no injury was sustained. On the same day, hearing there were some stores of rice and tobacco in a house some 300 yards down the main street, I determined upon an effort to obtain them, and sallied out with 30 men; these were immediately fired upon from several different quarters, and some fighting ensued, resulting in the death of one of my volunteers—shot through the heart. We charged down the end of the street, and drove the enemy to the cover of a cornfield at the outside of the town, where they were considerably reenforced, and recommenced a hot fire; but we were enabled to save a part of the articles which we were in search of, though we found that the enemy had anticipated us in this object, having forced the building from the rear. On the afternoon of the following day Ritchie's schooner, having provisions for us from La Paz, came in sight and anchored, but a canoe which was enticed toward the shore by a white flag displayed by the enemy was fired upon, and the schooner immediately got under way. On the 10th the enemy had entire possession of the town; they had perforated with portholes all the adjacent houses and walls, occupying the church, and, hoisting their flag on Galindo's house, 90 yards distant, held a high and commanding position, which exposed our back yard and the kitchen to a raking fire, which from this time forth was almost incessant from all quarters upon us, the least exposure of person creating a target for 50 simultaneous shots. The enemy appeared to have some excellent rifles, among other arms; and some of them proved themselves tolerably sharp shooters, sending their balls continually through our portholes.

On the 11th the fire was warm, but on our part it was rarely that we could get sight of them. In the afternoon of this day we had to lament the death of Passed Midshipman McLanahan, attached to the United States ship *Cyane*. A ball striking him in the right side of the neck, a little below the thyroid cartilage, lodged in the left shoulder. He died in about two hours. He was a young officer of great promise, energetic, of much forethought for his age, and brave to temerity. All lamented his untimely fate and all bear willing testimony to his worth. On the morning of the 12th, at daylight, we discovered that the enemy had thrown up a breastwork upon the sand, about 150 yards to the northeast of the cuartel and entirely commanding our watering place. We fired several round shot at it with little effect. We succeeded in getting in some water at night, but at great hazard, the enemy being in strong force and kept a close watch upon us. Their force was over 300, speaking within bounds. I immediately commenced digging a well in the rear of Mott's house, which is the lowest ground. I found that we had to go through rock and judged we should have to dig about 20 feet. I thought it imprudent to blast, as the enemy, suspecting our intention, would throw every obstacle in our way. The men worked cheerfully on this and the succeeding day against all difficulties. Our situation was becoming now an imminently critical one, having, with the greatest economy, but four days' water. On the 14th we continued digging for water. We found that the enemy had thrown up a second breastwork, more to the westward, giving them a cross fire upon our watering place. There was a continual fire kept up upon the cuartel during the day. At 3 o'clock 30 minutes p. m. a sail was reported in sight, which proved to be the

United States ship *Cyane*. She anchored after sundown. It was of course a joyful sight to us to see friends so near, but I was apprehensive that they could render us but little assistance, the enemy being so vastly superior in numbers. The enemy continued their firing upon us during the night.

On the 15th, at daylight, we became aware that the *Cyane* was landing men. They soon commenced their advance, which, for a few moments, was opposed only by a scattering fire; then the enemy opened upon them in earnest. They had concentrated nearly their entire force near San Vicente. We saw the flash of musketry through all the hills above the village. There was the odds of three to one against our friends. Steadily they came on, giving back the enemy's fire as they advanced. There was still a party of the enemy occupying the town, firing upon us. I took 30 men and sallied out upon them, and marched out to join the *Cyane's* men, who, with Captain Du Pont at their head, had now drawn quite near to us. There were small detached parties of the enemy still hovering about them, and firing at them, but the main body of the enemy had been broken, and retired to Las Animas, distant 2 miles. The march of the *Cyane's* men to our relief, through an enemy so vastly their superior in numbers, well mounted, and possessing every advantage in knowledge of the ground, was certainly an intrepid exploit, as creditably performed as it was skillfully and boldly planned, and reflects the greatest honor on all concerned. It resulted most fortunately for us in our harassed situation. They had but 4 wounded. This can not be termed anything but the most remarkably good luck, considering the severe fire that this heroic little band were exposed to. The loss of the enemy we have not positively ascertained; we hear of 13 killed, with certainty, and general report says 35; wounded not known. Of the total loss of the enemy in their attack upon the cuartel I can not speak with certainty. We have found several graves, and know of a number of wounded, one of whom we have in the cuartel a prisoner. I suppose their total loss to be not far from 15 killed, and many wounded; I am sure it could not be less than this. Our own total loss was 3 killed and 4 slightly wounded.

I regret to report the death of Passed Midshipman George A. Stevens, to whom, for his coolness and indefatigable zeal at a time when so much devolved upon him, I am most happy to accord the highest credit; and at the same time I must honorably mention the conduct of a volunteer, Eugene Gillispie, esq., who, although suffering from illness, never deserted his post, and was with me in the sortie of the 7th. The noncommissioned officers and men went through privation, unceasing watchfulness, and danger without a murmur. I can not express too highly my satisfaction in their conduct. Captain Du Pont, immediately upon his arrival here, becoming aware of our situation as regards provisions, took measures for our supply. The day after the battle of San Vincinte he dispatched a train, which brought us by hand (the enemy having driven off all the mules and horses) a quantity of stores and articles of which we stood most in need, among the rest bread, and has since been unceasing in his exertions for our relief. I can not too earnestly express the obligations which we are under for the prompt and efficient assistance which Captain Du Pont, his officers, and crew have rendered us.

I am, sir, respectfully, your obedient servant,

CHARLES HEYWOOD,

*Lieutenant, United States Navy, Commanding, San Jose.*

Lieut. Col. HENRY S. BURTON,

*United States Army, Commanding Troops in Lower California.*

True copy:

W. T. SHERMAN,

*First Lieutenant, Third Artillery, Acting Assistant Adjutant-General.*

UNITED STATES BARRACKS,  
*'La Paz, Cal., March 10, 1848.*

SIR: I have the honor to continue my report of January 16, 1848.

From the arrival of the U. S. sloop of war *Cyane* at this place on the 8th of December, 1847, until the time of her departure, and the arrival of the U. S. storeship *Southampton*, February 11, 1848, nothing of particular importance occurred in this portion of Lower California, the enemy having removed the main body of their force to invest San Jose, leaving a few outposts on the roads leading to this place for the purpose of cutting off all our communications with the interior of the country.

On the 8th of February I received a communication from the commander of the Mexican forces, which is herewith inclosed with my reply, marked "A."

The arrival of the *Cyane* at San Jose was very opportune, as the gallant little garrison of that place was closely invested and in a distressed condition.

The report of Lieutenant Heywood, United States Navy, commanding at San Jose, is herewith transmitted, marked "B." I can not omit this opportunity of expressing my own gratification and that of my command with the cordial cooperation, whenever necessary, of Captain Du Pont and his officers during the time the *Cyane* was here.

About the 13th of February we began to collect horses and saddles for the purpose of mounting a portion of this command.

On the night of the 26th of February Lieutenant Young, with a small party, surprised an outpost of the enemy about 7 leagues distant and captured three men.

On the night of the 26th of February Lieutenant Matsell, with a small party, surprised another outpost about 6 leagues distant and captured two more.

Captain Steele endeavored to surprise another outpost a few nights afterwards, but the enemy, receiving information of his movements in spite of his precautions, were not to be found.

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H. S. BURTON,

*Lieutenant-Colonel First New York Volunteers, Commanding.*

Lieut. W. T. SHERMAN,

*First Lieutenant, Third Artillery,*

*Acting Assistant Adjutant-General.*

True copy.

W. T. SHERMAN,

*First Lieutenant, Third Artillery,*

*Acting Assistant Adjutant-General.*

HEADQUARTERS UNITED STATES BARRACKS,  
*La Paz, Lower California, March 20, 1848.*

SIR: I have the honor to report that on the evening of the 15th instant Captain Steele, New York Volunteers, commanding a party of First New York Volunteers, accompanied by Lieutenant Halleck, United States Engineers, Surgeon Perry, 2 foreigners, residents in the country, and 3 friendly Californians acting as guides, aggregate 34, left this place with orders to attack an outpost of the enemy, about 5 leagues distant; or if, from information received on the route, it should prove practicable, to make a forced march upon San Antonio, the enemy's headquarters, and endeavor to rescue the American prisoners of war at that place.

The forced march upon San Antonio was made with great success; the enemy was surprised, several killed and wounded, two Mexican officers and one soldier taken prisoners, several arms and a small quantity of ammunition destroyed, the official correspondence and the flag of the enemy captured, one ambuscading party of the enemy defeated, and the command safe in La Paz within thirty hours from the time

it started. Our loss was but of one man killed—that of H. Hipwood, sergeant in B Company. Several of the men had their clothes pierced by the enemy's shot; a ball entered the saddle of Captain Steele, and the horses of Lieutenant Halleck and Private Melvin, of B Company, were wounded in those engagements. All engaged in the expedition acquitted themselves with great credit; and particular praise is due to Captain Steele, who commanded the troops, and to Lieutenant Halleck, by whose advice and assistance the expedition was undertaken and so successfully executed.

Inclosed herewith is Captain Steele's report.

I am, sir, very respectfully, your obedient servant,

HENRY S. BURTON,

*Lieutenant-Colonel, New York Volunteers.*

Lieut. W. T. SHERMAN,

*Acting Assistant Adjutant-General,*

*Tenth Military Department, Monterey, Cal.*

LA PAZ BARRACKS,

*Lower California, March 20, 1848.*

SIR: I have the honor to report that, in compliance with your order, I took command of the mounted force destined for an incursion into the interior. On the 15th, and between the hours of 9 and 10 p. m., we started. On examination I found our whole force to consist of 27 noncommissioned officers and privates, 3 officers (Surgeon Alexander Perry, Acting Lieutenant Scott, B Company, and myself), Lieutenant Halleck, United States Engineers, who kindly volunteered his valuable experience and services, and Messrs. Herman, Eherenberg, and Taylor, residents of this place, and 3 guides, Californians; aggregate, 34. On conferring with the officers, we were unanimous in the conclusion to proceed with all possible speed direct to San Antonio (the headquarters of the enemy) instead of attacking the advanced party at the ranch of Noviellas, with the principal object of rescuing the American prisoners of war confined there and doing all else we could.

We took the route by the ranch of the Tusalamas. Proceeding cautiously, we passed an outpost of some 50 men, without being observed by them, and reached the top of the mountain, overlooking and 8 miles distant from San Antonio, at daylight on the following morning, where we captured one of the "enemy's pickets" and, quickening our speed, we descended and passed up the arroyo to the east of the town, and, arranging the men, we charged into the town at full speed. A small party having been previously detailed to secure the persons of the officers of the enemy, the rest were directed against the building occupied as a cuartel for the soldiers, and not finding any there, one of the liberated captives directed my attention to a building on the other side of the arroyo, to the east of the town, distant from the plaza about 150 yards, and commanding it (to which I afterwards learned the soldiers had been removed but the day previous, thereby deranging all our previous plans of attack), from which, with a small force of the enemy drawn up in front, a brisk fire of musketry opened upon us.

Having first gained our object in rescuing our men, besides taking two of their officers prisoners, I ordered the men to dismount and rally under cover of the church on the east side of the plaza.

The party sent to secure the officers were unsuccessful in securing the commandant (he escaped in his night clothes, having just arisen from his bed), but the second in command, Captain Calderon, and the adjutant, Lieutenant Arse, were taken, their flag and the private and public papers secured. When a sufficient number of our men had rallied, we sallied out and charged the enemy in position and drove them in all directions to the adjacent hills, killing 3 of their number and wounding 7 or 8. The rout of their force being complete, which we learned amounted to some 50 men,



and being too tired to pursue them, we collected all the arms they abandoned (some 30), their trumpet, bullet molds, etc., destroyed them, and left them in the plaza, as it was impracticable to carry them with us.

I have to record the loss of one of our number, Sergt. Thomas M. Hipwood, of B company, who fell dead in the charge, pierced by a bayonet and two balls. "A better and a truer man never fell in his country's service or the performance of his duty, and his loss will ever be lamented by those who knew his worth."

Pantaloons, cravats, hats, horses, saddles, attest the numerous narrow escapes, but none wounded.

Not more than half an hour elapsed before we were on our way back. We halted at a ranch after traveling some 10 miles (owing to the accession to our number of men, and but one or two horses, many had to walk that distance) for the first time to refresh. In two hours we were on our way again, but little recruited in strength. Proceeding slowly, we reached the mountain pass of Trincheras a little before sunset and were just entering an arroyo, bordered by elevated banks and a thick growth of underbrush, when a fierce fire of musketry opened upon us in front; a dismount and rally in front was but the work of an instant, the men standing fire like veterans. I ordered the advance guard to deploy the right and left, who drove them from tree to tree and hill to hill, while the main body proceeded slowly, leading their horses, until we had passed the dangerous ground, when we mounted and took a different road, diverging to the right, which would make the distance much farther, but the traveling much safer.

There was none wounded on our side. One of the captives, Captain Calderon, received a severe wound from a rifle ball in the right breast from the fire of the enemy, which did not prevent his riding, however; the horses received several wounds, but not so as to disable them. The loss on the part of the enemy was some five or six killed and wounded. We continued our march, proceeding some 3 miles farther, when our rear guard was attacked; but on firing one musket at them, they scampered off and scarcely a charge ensued. We proceeded cautiously, but our horses were getting now so fatigued that they would lie down, and it was with the greatest perseverance and exertion that we continued advancing, but finally arrived at the barracks on the morning of the 17th at 2 a. m.

Having accomplished the extraordinary distance of 120 miles (the route we took) in less than thirty hours on the same horses, with but little food or refreshment, stopping but once to feed, through the most rocky country and the roughest road that can be traveled, and by men many of them totally unused to riding and without any previous preparation, I can not express in terms too commendatory the coolness and bravery displayed by the men of my command. Acting Lieutenant Scott, B Company; Sergeant Peasley, A Company, and Sergeant Denneston, B Company, were conspicuous.

To Surg. Alexander Perry, Lieutenant Halleck, United States Engineers, most sincere thanks are due for their counsel and assistance. And to Mr. Herman Ehrenberg, "my volunteer aid," to say that he fully sustained that reputation for gallantry, coolness, and bravery that has been awarded to him on former occasions is enough. And to Luz, Morano, and to Juan de Dios Talamantis, our Californian guides, I am greatly indebted. Their bravery and fidelity deserve to be duly appreciated.

Respectfully, your obedient servant,

SEYMOUR G. STEELE,

*Captain, First New York Regiment, Commanding.*

Lieut. Col. HENRY S. BURTON,

*United States Army, Commanding United States Forces, etc.*

## UNITED STATES BARRACKS,

*La Paz, Cal., April 13, 1848.*

SIR: I have the honor to acknowledge the receipt of your letter of March 1, 1848, and to report the arrival of the army storeship *Isabella* at this place on the 22d of March, 1848, with Captain Naglee's company (1) New York Volunteers, and 114 recruits for the detachment of New York Volunteers stationed at this place.

The rescue of the prisoners of war on the 15th ultimo caused great excitement among the enemy, and tended very much to disorganize their forces, and the important arrival of the reenforcements to my command determined me to take the field as soon as possible. Accordingly, I left this place on the morning of the 26th instant with 217 officers and men; Lieutenant Halleck, United States Engineers, acting chief of staff, and Passed Midshipman Duncan, United States Navy, temporarily attached to the mounted portion of Captain Naglee's command.

The afternoon of the 27th a party of 15 men captured, in San Antonio, Pineda, the commander of the Mexican forces, with his secretary, Serano.

The morning of the 29th, having received information that the enemy had concentrated their forces in Todos Santos, we pressed on with all speed, fearing they might evade us by retreating toward Magdalena Bay. The morning of the 30th, about 10 o'clock, having received accurate information respecting the enemy, Captain Naglee, with 45 mounted men, was dispatched to intercept the road leading from Todos Santos to Magdalena Bay, and, if practicable, to attack the enemy in the rear at the same time our main body made its attack in front.

The road leading from Todos Santos to La Paz, for some distance before reaching the first-named place, passes through a dense growth of chaparral (very favorable for an ambush), and in this the enemy made their arrangements to receive us. We left the road about 5 miles from Todos Santos and marched along a ridge of high land on the north side of the river, having full view of the enemy's operations.

They then took possession of a commanding hill directly in our route, between 3 and 4 miles from Todos Santos, with their Indians in front. Companies A and B, under the direction of Lieutenant Halleck, were deployed as skirmishers in such a manner as to expose the enemy to a cross fire. The enemy opened their fire at long distance, but our force advanced steadily, reserving their fire until within good musket range, when it was delivered with great effect, and the enemy retreated very rapidly after a short but sharp engagement. At this time Captain Naglee, being near Todos Santos and hearing the firing, attacked the enemy in the rear, and after a severe action completed the dispersion. Our men and horses being too much fatigued by their long march to pursue the scattered enemy, we marched on to Todos Santos.

The loss of the enemy in this engagement can not be ascertained with any accuracy; we know of 10 killed and 8 wounded. One man and the horse of Acting Lieutenant Scott were slightly wounded, the enemy, as usual, firing too high.

Our officers and men fully sustained the character they won on the 16th and 27th of November last.

My warmest thanks are due to Lieutenant Halleck for his assistance as chief of staff, and I present him particularly to the notice of the colonel commanding for the able manner in which he led on the attack on the 30th ultimo.

Captain Naglee also deserves particular notice for the energetic and successful manner in which he fulfilled his instructions. A copy of his report is herewith inclosed.

On the 31st ultimo Captain Naglee, with 50 mounted men of his company, was ordered to pursue the enemy in the direction of Magdalena Bay. He returned to La Paz on the 12th instant, having pursued the enemy very closely, capturing 5 prisoners and some arms.

Lieutenant Halleck started for San Jose with a party of mounted men, consisting

of 1 officer and 25 noncommissioned officers and privates, on the 5th instant, for the purpose of communicating with Captain Dupont, commanding U. S. sloop of war *Cyane*. He returned here on the 11th instant, having captured 10 prisoners on his march and taken a number of arms.

From him I learn that the naval force at San Jose have thirty-odd prisoners, and among others Mauricio Castro, the self-styled political chief of Lower California. Lieutenant Selden, with a party from the *Cyane*, made a most opportune march on Santiago, where he captured a number of the enemy who had fled from the field of Todos Santos. Castro, who commanded the enemy's forces in the action on the 30th, was arrested near Maria Flores by the civil authorities and delivered up to Lieutenant Selden.

During the stay of our main body at Todos Santos 14 prisoners were captured, among them two sons of the reverend padre, Gabriel Gonzales, officers of the Mexican forces.

We left Todos Santos on the 5th instant and arrived at this place on the 7th. The result of this short campaign has been the complete defeat and dispersion of the enemy's forces.

We have captured their chief and 6 officers and 103 noncommissioned officers and privates, and others are daily presenting themselves to the civil authorities in different parts of the country.

The captured arms have been given to those rancheros known to be friendly to the interests of the United States for their protection.

I am, sir, with much respect, your obedient servant,

HENRY S. BURTON,  
*Lieutenant-Colonel, New York Volunteers.*

Lieut. W. T. SHERMAN,  
*Acting Assistant Adjutant-General, Tenth Military Department.*

TODOS SANTOS, *March 30, 1848.*

I have the honor to report that after receiving your verbal order at 10 o'clock a. m. this day "to select the men" from "those of my company that were mounted, whose horses would be able to carry them more expeditiously to the junction of the road by the arroyo Muelle at its mouth with the road from Todos Santos, in the direction of Magdalena Bay one league and a half from Todos Santos, and there ascertain whether the enemy had passed toward Magdalena Bay, and if so to follow them; or if still remaining at Todos Santos to attack them or not, at my discretion," I selected 45 men, and at 1 p. m. arrived at the point designated, where I received information that the whole of the Mexican forces, numbering from 200 to 300, were lying in position on the main road leading out to Todos Santos and about half a league from it. I immediately dispatched a courier to you with this information, adding my determination to attack him in the rear about the time you should approach from the front. The men and horses were then allowed one hour's rest—the latter having been fifty-six hours without feed. At 2 p. m. we again mounted; at 3 passed through Todos Santos and passed as rapidly as our horses could bear us toward the point occupied by the enemy, who had been informed of our approach. When half a league without Todos Santos we discovered a body of cavalry posted, partly concealed among a heavy growth of cactac, at the foot of a steep ridge, and a body of Indians and Mexicans in line along its summit—in all about 120. The detachment was ordered into line within 50 yards of the first, and whilst forming, and before it could be dismounted, received the fire of those at the foot of the ridge, who retired toward those at the summit, where they were joined by a large number who came precipitately from the other side.

The detachment, after leaving a guard of 10 men with the horses, was marched by a steep rocky path half way up the side hill, it being the only approach, and there deployed to the right and left and charged upon the summit. The enemy continued their fire until we had approached to within 50 yards and commenced firing, when they broke and ran. They were pursued until they were completely routed and until, fearing my command was becoming too much scattered among the immense cacti with which the surface of the whole country is covered, they were recalled and we returned to this place by 5.30 p. m.

A number of the bodies of the enemy was found, but it was impossible to say what was their loss. A number of their horses and a quantity of their baggage was captured.

Our thanks are due to First Lieut. George H. Pendleton, of my company, and to Passed Midshipman James M. Duncan, of the United States Navy, for the very satisfactory manner that they performed every duty.

Of the men, I could not in justice to them say less than that volunteers never behaved better.

I have the honor to be, very respectfully, your obedient servant,

HENRY M. NAGLEE,

*Captain, First New York Regiment, Commanding Detachment.*

Lieut. Col. H. S. BURTON, *Commanding.*

LA PAZ, LOWER CALIFORNIA, *April 16, 1848.*

SIR: Inclosed herewith I send you Captain Naglee's report of his operations from the 30th of March, 1848, when he left Todos Santos, until the 14th instant, when his whole command arrived here, with a copy of my instructions to him; attached also is a copy of General Scott's General Orders, No. 372, of 1847.

Before leaving Todos Santos Captain Naglee held much conversation with Lieutenant Halleck and with me respecting the fourth article of those general orders, and he was distinctly told, particularly by Lieutenant Halleck, that if he took any prisoners they could not be shot without the sanction of a council of war; and that he (Captain Naglee) could not, under the circumstances, order such council.

From San Ilarius, April 8, 1848, Captain Naglee reported to me, and I considered the report, approving of the course he had thus far pursued and directing him to return to La Paz.

On the 11th of April, 1848, I received a communication from Captain Naglee, which is herewith inclosed with my reply. Captain Naglee did not receive the reply, as the courier could not find him.

When within a mile or less of La Paz the two prisoners—Juan Jose Brule, a Mayo Indian, and Antonio Keyes, a Californian and a resident of La Paz—were shot by order of Captain Naglee, in my opinion in direct violation of General Scott's order, No. 372, and of my instructions to him. The case is thus laid before the colonel commanding for his decision and opinion as to the course to be pursued respecting it.

I am, sir, very respectfully, your obedient servant,

HENRY S. BURTON,

*Lieutenant-Colonel, New York Volunteers.*

Lieut. W. T. SHERMAN,

*Acting Assistant Adjutant-General, Tenth Military Department.*

CARISALO, *April 11, 1848.*

SIR: We arrived here yesterday at 3 p. m., intending to push on to La Paz, but our animals are so tired that I am compelled to remain here until this afternoon, and will hope to get to La Paz during to-morrow morning.

I have no other news to communicate except that the country has been well cleared of its cursed vermin, and that there are not half a dozen Taquies south of Punification. I have 5 prisoners with me, but shall shoot 2 of them when near La Paz, in sight of the ruin that they have caused. I have sent with this a note to Lieutenant Penrose for 150 rations of hard bread and 150 rations of coffee. Mr. Pendleton will not get here before to-night and will not be able leave here before to-morrow evening.

Very respectfully, your obedient servant,

H. M. NAGLEE.

Lieut. Col. H. S. BURTON,  
*Commanding, La Paz.*

A true copy.

HENRY S. BURTON,  
*Lieutenant-Colonel, New York Volunteers.*

LA PAZ, LOWER CALIFORNIA, *April 11, 1848.*

SIR: In your unofficial note of to-day you mention your intention of shooting two of your prisoners when near La Paz, in sight of the ruin they have caused. I am under the impression that your instructions will not admit of this course. You will therefore bring all of your prisoners to La Paz.

I am, sir, with much respect, your obedient servant,

HENRY S. BURTON,  
*Lieutenant-Colonel, New York Volunteers, Commanding.*

Capt. H. M. NAGLEE,  
*New York Volunteers.*

A true copy.

W. T. SHERMAN,  
*First Lieutenant, Third Artillery, Acting Assistant Adjutant-General.*

HEADQUARTERS FIRST DETACHMENT NEW YORK VOLUNTEERS,  
*Todos Santos, March 31, 1848.*

SIR: You will leave this place this afternoon at 4 o'clock, with the mounted men from your company, for the "Cunano," distant about 50 miles, on the road to Magdalena Bay, for the purpose of intercepting any of the enemy's forces which may move in that direction. On arriving at that place you will be guided in the course then to be pursued by such information as you may obtain, it being the object to follow and cut up the scattered forces of the enemy wherever they may be found. And even before reaching "Cunano" you will be at liberty to change your direction if, in your opinion, circumstances justify you in doing so. If you should not again join the main body, you will proceed to La Paz after having accomplished, so far as you may be able, the object indicated above. The movements of the main body will depend entirely upon the information respecting the enemy's position; but it is hoped that you may be able to communicate to headquarters anything you may learn of the enemy's operations. In your treatment of the Taquies you will be governed by General Orders, No. 372, of 1847, of General Scott's, regarding them as robbers and murderers who are bound by no civilized rules of warfare.

I am, sir, very respectfully, your obedient servant,

HENRY S. BURTON,  
*Lieutenant-Colonel First New York Volunteers, Commanding.*

Capt. H. M. NAGLEE,  
*First New York Volunteers.*

The undersigned would respectfully report that he received the above order at 4 o'clock p. m. on the 31st of March, and at 5 o'clock p. m., with 50 men, left Todos Santos to pursue the enemy. We had scarcely commenced our march when it was discovered that the guide upon whom we were most trusting for our information, and who resided at "Cunano," had not joined us. The interpreter was sent back to advise you of this fact, but nevertheless this guide did not join us. When near the mouth of the arroyo Muelle we were informed that Jose Rosa Merina, a Mexican officer, with 16 men, and Colegial, the Taqui chief, with 26 Indians, had gone toward "Carisalle" to wait for others to join them. We were informed that the distance to Cunano was 55 miles, by a heavy sandy road, without a habitation or drop of water. We had but three days' provisions, and the animals, although they had rested twenty-four hours, had filled themselves with the stocks of the green corn and sugar cane and were not in a condition to travel the road to "Cunano." I therefore concluded to take the road to "Carisalle," and thence by the road to "Aripes," near La Paz, where I could order in advance an additional supply of provisions, and proceeded to San Ilarius and "Aqua Colorado," where all the enemy must necessarily pass who were retreating toward "Mulige."

On the morning of the 1st of April we reached "Carisalle," 36 miles from "Todos Santos," but were disappointed in learning that the forces above referred to had passed during the night without stopping, and a few hours afterwards, while the men were sleeping, a small party of cavalry made their appearance and were pursued, but they ran into the cactac, and it was impossible to follow them. At 6 p. m. we were mounted, and followed the trail of the previous night for about 6 miles, when it left the road and entered the cactac, and we afterwards learned they had been advised of our pursuit and changed their route.

On the morning of the 2d we arrived at the "Aripes," and were here detained unnecessarily twenty-four hours waiting for a detachment that had been dispatched in advance for provisions. They returned on the 3d and reported the capture of two Mexican soldiers at Refugio. During the 3d we passed through "Rodrigues, El Caxon de los Reys," and at midnight reached "Los Reys."

On the evening of the 4th we arrived at Guadalupe, and, leaving 25 men with Lieutenant Pendleton, with the remainder we pressed forward for "San Ilarius." When within 9 miles of that place we were informed that a party of 50 Taques had passed from "San Ilarius" to "La Junta," and we at once turned in that direction. At 4 p. m. of the 5th, after having searched all the places where the Indians would have stopped, we approached the last hut, and the only one of the four in "La Junta" that had not been deserted, and discovered the fires of the Indians, which were 200 yards from the house and on the other side of a lagoon, around which it was necessary to pass. We dismounted, and with 15 men were in the act of surrounding them, when one of the guides discharged his musket, which awakened the Indians. We charged in upon them, but it was too dark to use powder and ball, and they made their escape. We, however, succeeded in capturing all their horses, arms, and ammunition and in taking two prisoners, which were afterwards ordered to be shot.

In consequence of the outrages that this band of Indians were committing and the impossibility of my overtaking them (for I could not obtain fresh horses), I considered some extraordinary effort absolutely necessary to drive them out of the country and at the same time to reassure the "rancheros," who were so much intimidated by the diabolical acts of these villains that many of them had left their houses and concealed their families and the little property they could carry with them in the mountains. I therefore called upon the authorities and rancheros (see the copy attached) to arrest them in their flight, and sent a detachment of a sergeant and 9 men, in company with Don Juan de Dios and Don Questis, responsible Mexican friends, to pursue the Indians as far as "Punification."

It being impossible for our tired horses to go farther, suffering for the want of food, barely living upon sprouts of the mesquit tree, and there being no water at the places I have named—frequently 30 and 50 miles apart—and learning that a number of Mexican officers with 30 to 40 men were concealed near San Antonio, I determined to return, and on the 6th I ordered Lieutenant Pendleton to take the road by “Agua Colorado,” while I took that to “San Ilarius,” and to meet at “Coneja,” where the roads join.

On the 7th I learned that two Mexican soldiers were concealed about the premises of Don Juan Gomez De Ayer, a Portuguese, living at San Ilarius. He denied any knowledge of them until he was placed in arrest and ordered to be taken to La Paz, when he had them produced. One of them had been wounded at San Jose.

On the morning of the 8th we reached Coneja, 40 miles, and Lieutenant Pendleton joined me and brought one prisoner that one of his patrols had taken near Agua Colorado. On the 9th we entered Cunano, 18 miles. Here, as at Coneja, both on the Pacific coast, we found a little very brackish water and some salt grass of two years’ standing, there having been no rain during that time. We learned that there had passed, in all, about 90 persons during the 2d and 3d; that none had passed since; that the greater part of these had been driven from the other roads in consequence of our close pursuit, and they were so much pressed, knowing they would receive no quarter, that many of them had thrown away their arms.

On the morning of the 10th we entered Carisalle, 45 miles, without water or grass, and hearing of the surprise of the Mexicans near San Antonio by Lieutenant Selden, of the *Cyane*, we rested our tired men and animals during the 11th, and on the 12th returned to La Paz, and Lieutenant Pendleton and Sergeant Roach on the 14th, the former bringing three and the latter two prisoners.

Although not so fortunate as to come in close contact with many of the enemy, we have at least succeeded in preventing any reunion and in keeping them moving toward Loretto and Mulige, toward which points they have proceeded with the most astonishing rapidity. Since the evening of the 31st of March we have passed over all the road and searched all the ranchos between Todos Santos and La Paz, and as far north as Punification, and cleared that part of the country with the ruin that threatened to destroy its vitality.

During the pursuit we have traveled 350 miles over a road—or rather a path, for there are nothing but narrow mule paths in any of Lower California—through a worthless waste of sandy, rocky country, literally covered with the cactus and various species of leafless thorn bushes so closely matted together that none but a Californian with his leather clothes and armor on can pass through them. The sun was so hot that we could not travel under it, and there was no water except at the places named, which was frequently so brackish that the thirst was increased more than diminished. At these places we found one, and never more than two, miserable huts, in which the occupants barely existed upon some milk and meat, and the cattle so exceedingly poor that they could hardly sustain their frames.

My command suffered much from the burning sun, dust, and the want of their full rations, living upon nothing but hard bread and fresh beef, and more than half the time upon the latter alone.

I have the honor to be, very respectfully, your obedient servant,

HENRY M. NAGLEE,

*Captain, First New York Regiment, Commanding Detachment.*

HENRY S. BURTON,

*Lieutenant-Colonel First New York Regiment, Commanding, etc.*

*To all whom it may concern:*

Know ye that authority is hereby given, and the authorities and rancheros are hereby required, to arrest, and in the arrest to use any force that may be required, even to the taking of life, in order to bring to immediate punishment, a number of banditti who are known by the name of Taquies, and who have committed robbery, arson, murder, and rape, and are now committing the most infamous crimes through the whole country, and in consequence of which they have been declared outlaws and their lives forfeited. Any prisoners that may be taken will be delivered to the nearest United States forces, and any lives that may be necessarily taken under this authority will be reported to the commanding officer of the United States forces at La Paz.

Given under my hand at Junta, Lower California, this 5th day of April, A. D. 1848.

HENRY M. NAGLEE,  
*Captain, First New York Regiment,  
 Commanding Detachment New York Volunteers.*

(To the authorities and rancheros at Cayote, Punification, etc., to Mulige.)

LA PAZ, LOWER CALIFORNIA, *April 17, 1848.*

SIR: I have the honor to send you herewith (in duplicate) returns for this post for the months of January, February, and March, 1848, and a copy of the written orders issued during the same period.

I am happy to report that the defeat and dispersion of the enemy on the 30th ultimo has been complete, and seems to have concluded the insurrection here.

The southern part of the peninsula is perfectly quiet. It is rumored that a party of the enemy has reunited at Mulige, but not in sufficient force to be effective. The present force in Lower California is thought to be sufficient to keep the country quiet, provided our squadron can prevent communication with the coast of Mexico for the purpose of bringing over arms, ammunition, and men.

To-morrow nine prisoners of war, among them Manuel Pineda, the late Mexican commander in this country, and the reverend padre, Gabriel Gonzales, with his sons, will be sent to Mazatlan.

\* \* \* \* \*

HENRY S. BURTON,  
*Lieutenant-Colonel, New York Volunteers.*

Lieut. W. T. SHERMAN,  
*Acting Assistant Adjutant-General, Tenth Military Department.*



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